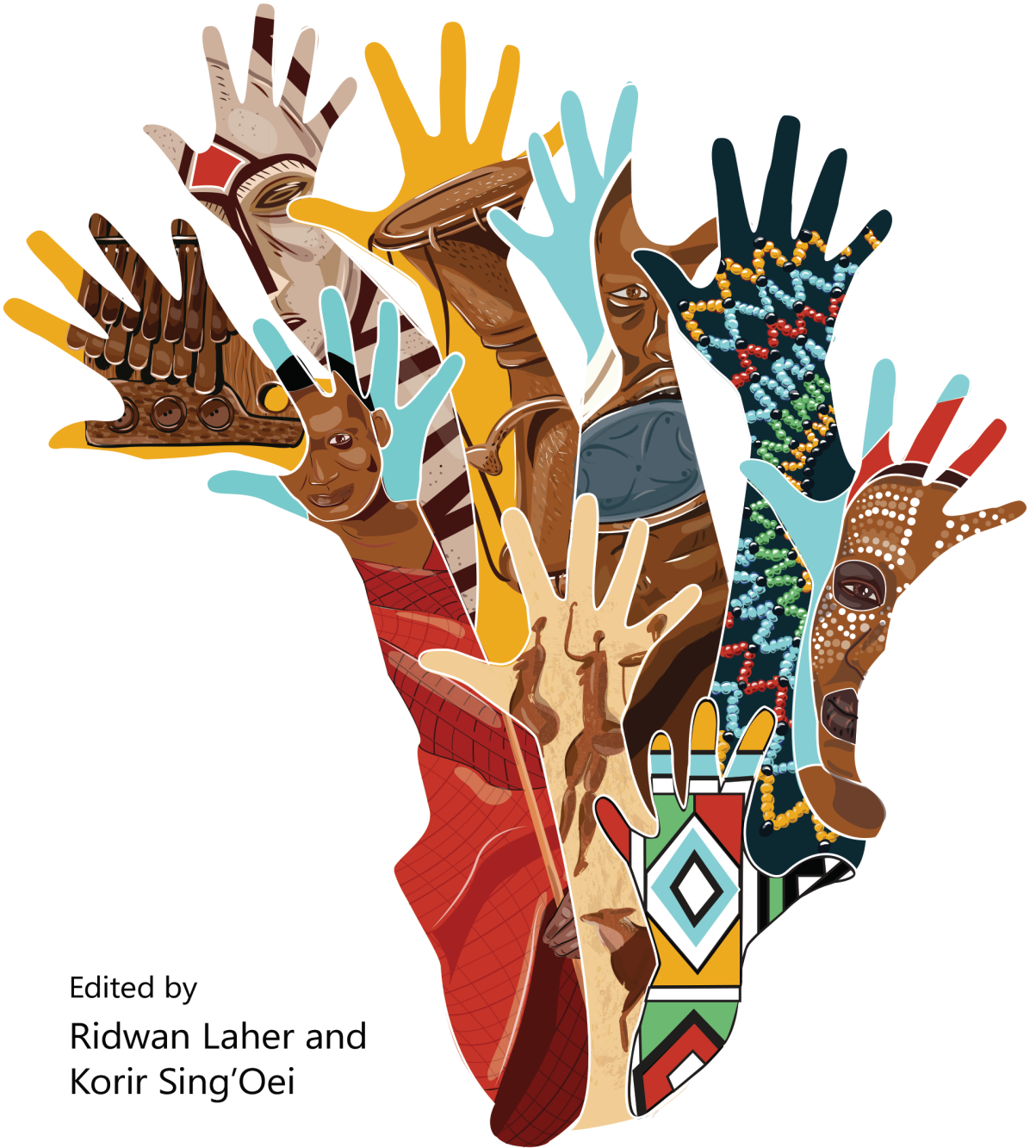


Contestations, Empowerment and Group Rights

Edited by
Ridwan Laher and
Korir Sing'Oei



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Indigenous Peoples in Africa

Contestations, Empowerment and Group Rights

Edited by Ridwan Laher and Korir Sing'Oei



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Preface

Michelo Hansungule

At what point does an advocacy intervention acquire the status of 'best practice'? Is it because of its notoriety in the literature or ubiquity in being referenced in judicial determinations? Dr Siri Gloppen, the highly acclaimed Norwegian political scientist and an authority on social impacts of judicial processes in explaining the scope of public interest litigation as an instrument for effecting social change, posits that:

... the value of litigation should not only be judged in terms of how a case fares in court (success in the narrow sense), or whether the terms of the judgment are complied with (immediate impact). It is as important to look at the systemic impact – the broader impact of the litigation process on social policy, directly and through influencing public discourses on social rights and the development of jurisprudence nationally and internationally.¹

*Endorois v Kenya*² is one of the few cases decided by Africa's premier human rights mechanism, the African Commission on Human and Peoples Rights, whose impact reverberates not only in relation to the immediate beneficiaries, but rather across a range of indigenous rights actors for several reasons. First, drawing from the Report of the Working Group on Indigenous Populations to deconstruct indigeneity, the Commission makes an important and poignant observation thus:

Domination and colonisation has not exclusively been practiced by white settlers and colonialists. In Africa, dominant groups have also after independence suppressed marginalized groups, and it is this sort of present-day internal suppression within African states that the contemporary African indigenous movement seeks to address ... If the concept of indigenous is exclusively linked with a colonial situation, it leaves us without a suitable concept for analysing internal structural relationships of inequality that have persisted after liberation from colonial dominance.³

The Commission's bold exposure of the pretensions of many an African state which mask internal exclusionary processes through the language of equal protection is crucial in recalibrating states' response to unjust expropriation of communal resources of the poor.

Second, the implication of this decision on restitution law and the governance of land injustices that crave resolution in many sub-Saharan countries suggests that there are means for less-volatile approaches to the issue.⁴ Additionally, the decision has done more to develop the law in relation to the right to development and natural resource right law beyond its worthy predecessor, the Ogoni case.⁵

By judicial fiat, the Commission placed the *Endorois* decision in the conveyor belt of judicial precedents of note on the continent. This publication in turn reinforces the precedent value of the decision by using the case to examine various indigenous rights discourses on the continent. The multidisciplinary approach to the complex discussion on indigenous rights is critical to a more holistic appraisal of the issue. By so doing, the material in this publication exposes existing opportunities for more inquiry among various social science researchers and activists for social change.

NOTES AND REFERENCES

- 1 Gloppen, S., 2007. *Courts and the marginalized: Comparative perspectives*.
- 2 African Commission on Human and Peoples' Rights, Communication, 276/2003. Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of *Endorois Welfare Council v Kenya*.
- 3 *Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities*, submitted in accordance with the Resolution on the Rights of Indigenous Populations/Communities in Africa, IWAGIA (Copenhagen) and ACHPR, Banjul 2005, p.92.
- 4 Compare with the Zimbabwe case in Moyo, S. & Yeros, P., 2013. *The Zimbabwe model: Radicalisation, reform and resistance*. Codesria. Available at http://www.codesria.org/IMG/pdf/9-Land_and_Agrarian_Reform_in_Zim_Moyo_and_Yeros.pdf
- 5 African Commission Communication No. 155/96, 2001. *The Social and Economic Rights Action Center for Economic and Social Rights v Nigeria*.

Acknowledgements

This volume is a collaboration that grew out of a chance meeting between the editors in Nairobi, Kenya, in mid-2010. The meeting took place at the offices of the Centre for Minority Rights Development (CEMIRIDE). At the time of the meeting, Ridwan Laher was a chief research specialist and head of the Sustainable Development Unit at the Africa Institute of South Africa (AISA), and Korir Sing'Oei was leaving CEMIRIDE, the organisation he had co-founded eight years previously.

The meeting led to a subsequent conference in late 2010 in Lamu where the initial discussions about collaborating on a book on indigenous rights began. Korir then began a one-year fellowship at AISA as a visiting research fellow, during which time the idea of the book was discussed internally and fine-tuned within the organisation.

It is not an overstatement to say that this volume would not have seen the light of day were it not for the support and guidance of Professor Phindile Lukhele-Olorunju, the acting chief executive officer of AISA. Professor Lukhele-Olorunju's collegial management alongside of AISA's commitment to cutting-edge African scholarship were the key driving motivators for this volume.

We also owe a debt of gratitude to AISA's director of publications, Solani Ngobeni, for steering this volume through the processes of editing, peer review and ultimately publication.

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We are also greatly indebted to communities in Lamu, Kenya and the Endorois, whose resilient but dignified stand for their rights in the face of overwhelming state intrusion on their lands, livelihood and culture epitomises the best of grassroots agency.

Lastly, but certainly not least, we owe a sincere debt of gratitude to the contributors who joined this project in the belief that a discussion of indigenous rights in Africa needed more attention.

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Introduction

Ridwan Laher and Korir Sing'Oei

That the indigenous world of custom, ritual and communal governance, especially in Africa, pre-dated the current configurations of nation-states in the continent is unarguable. Despite this reality, international and domestic law, in failing to accord this reality pride of place, has historically banded together customary communities under the rubric of peoples without cognisable sovereignty. Treaties and armistices,¹ whenever entered into, between the European powers and native inhabitants were, in the main, considered transitory and clever artifices designed to secure territories without conquest, but were never intended to be enforceable contracts against colonialists.²

Deemed backward and uncivilised, John Westlake, the foremost apologist of colonial annexation of territories in new lands in the nineteenth century, would argue that indigenous people, insofar as they did not enjoy European-style governance and a sedentary lifestyle, could not have constituted part of 'international society' which was limited to the civilised nations,³ and any domination and conquest exercised over them would be considered a legitimate expression permissible by the international standards of the time. Other later apologists would attribute the exclusion of indigenous people from the comity of nations to their non-recognition by other civilised states.⁴ A more egregious legal doctrine used during the nineteenth century to appropriate indigenous peoples' territories, especially in Africa, was *terra nullius* under which land occupied by the indigenous peoples was considered 'legally unoccupied', and therefore free to be owned by colonialists through 'legal means'. International law in the twentieth century has, however, discounted the legitimacy of this doctrine.⁵

More nuanced approaches were also pursued to secure the wanton spoliation of indigenous territories. Franciscus de Vitoria, a sixteenth century Spanish Renaissance Roman Catholic theologian and jurist, noted especially for his contributions to the theory of just war in international law,⁶ held the view that while conquest was an impermissible moral basis for annexing land occupied by indigenous communities, such an annexation could be justified by the need to advance free trade and halt any barbaric practices on the part of natives, which he deemed contrary to the laws of nature.⁷ Consequently, the major attributes deployed to discount the legitimacy of the legal status of indigenous communities in international law rested on three issues that ran foul of a Eurocentric vision of modernity: lack of centralised political organisation; a nomadic livelihood system; and their culture.⁸ To adherents of this school of thought, indigenous rights, if even recognised at all, were either totally overrun or severely constricted by the entrance of the colonial state.⁹

The extractive character of the colonial state was designed to transfer resources to the metropolitan power with little regard for local development. Its arrival in Africa ushered in

a period of untrammelled turmoil, violence, population transfers and dispossession. The consequence of colonisation was compounded by the creation of the colonial state, whose inherent exclusion was seized with gusto to further the marginalisation of indigenous peoples.

Decolonisation in Africa did not witness an era of extensive restitution of property in land to indigenous and other rural communities whose homelands had been forcefully seized in order to advance colonial agricultural, nature conservation and mining enterprises. Except in post-apartheid South Africa where broad normative admission has been made in regard to the inequity of forced dislocation of communities through discriminatory legislation of the apartheid state,¹⁰ most African countries have taken the view that the imperatives of a modern developmental state were incompatible with the recognition of indigenous property systems.¹¹ This is the cloak that post-colonial Africa has deployed to put a wrap on claims of past appropriations while establishing a new foundation for contemporary elite land grabs for purposes not too dissimilar from those of the departed colonial order.

This is the context in which the decade-long struggle for the recovery of Endorois land in Kenya is waged. The decision by the African Commission on Human and Peoples' Rights (ACHPR), the continent's premier quasi-adjudicative human rights body that broadly recognised the feasibility of restitution of the Endorois' communal lands forcefully expropriated by the state, provides a critical juncture for a re-examination of the place and meaning of customary-based property rights systems on the continent. Riding the wave of developments in national courts, especially within South Africa, whose constitutional court had, in 2004 in the *Richtersveld* case, determined that the rights of an indigenous community survived the annexation of the land by the British Crown and could be held against the current occupiers of their land,¹² the Endorois decision weaves a new continental narrative on natural resources and development issues whose import calls for careful reflection.

This volume is an attempt to provide this reflexive space. This project was mooted in Lamu, a site earmarked for the establishment of Kenya's second seaport and the epicentre of a complex trans-frontier infrastructural project, the Lamu Port-South Sudan-Ethiopia Transport (LAPSSET) Corridor. Uniquely, Lamu sits not only on a world heritage site encompassing ancient Swahili cities along the coast but also on indigenous cultures rooted in fishing and hunting-gathering livelihoods. It is here that the editors met with communities late in 2010 to discuss the predicament and potential of LAPSSET. In the course of several meetings with concerned communities from across Lamu District, it became clear that the lessons of the Endorois decision had neither been understood nor internalised into governmental policy and programmatic praxis. The result is that many inhabitants in Lamu District viewed the government's intention with enough suspicion to raise the spectre of a recurring wave of colonisation, but this time after independence. The impasse that continues in Lamu District is indicative of similar contestations between indigenous peoples across the African continent where concerns about the bona fide intentions of post-colonial governments still hark back to the fears of domination and erasure that came with European colonisation.

Cynthia Morel's article provides the starting point for this volume, and provides an in-depth exposition of the Endorois case, which forms the basis for examining various facets

of indigenous rights within the context of the ACHPR. Based on a legal case involving post-colonial dispossession of an indigenous community, Morel's examination of the Charter's application towards resolving the community's predicament endorses the view that judicial mechanisms can be counter-majoritarian, and can therefore come to the aid of marginalised groups whose political voice is either weak or absent.¹³ The Endorois case represents a historical moment for the judicialisation of land-related contestations, and reinforces other policy processes on the continent, including the African Union's adoption of a Declaration on Land Issues and Challenges in Africa in 2009. Readers should therefore appreciate Morel's chapter as an anchor for the discussions that follow in the volume.

This interdisciplinary volume, however, is anything but a singular laudatory remark on indigenous rights in Africa. As Felix Ndahinda's chapter will attest, the nomenclature of indigenous rights is itself laden with internal inconsistencies and external legitimisation concerns. At a time when the continent's political leadership is ambivalent towards internationalism thanks to the activities of the International Criminal Court in Sudan, Kenya, Ivory Coast, Liberia and elsewhere, the utility of deploying contested international standards to resolve the contradictions bedevilling Africa's property rights systems might as well be questioned.

Melakou Tegegn's chapter problematises the policy choices of post-colonial African states which appear to have boarded the wrong developmental train inspired by the colonial view that the economic feasibility of the traditional livelihoods of communities was doubtful while privileging highly extractive modes of production, whether large-scale agriculture, irrigation or mining. The consequences of these choices on the environment and economic independence of many countries have been dire. The intense developmentalism now prevailing in many parts of Africa, driven largely by Chinese capital that is often agnostic to human rights concerns, in combination with the over-arching global agenda of other transnational capital entrepreneurs, are issues discussed in Melakou's chapter.

Locating the proper public role of women in indigenous communities is often challenging. Considered bastions of patriarchy, customary systems are perceived as the real reason for the exclusion of women in the socio-economic life of many African countries. Soyata Maiga's paper grapples with these assumptions, and in reviewing the existing normative frameworks appears to suggest that perhaps the challenge lies not in communities but rather in the failure of states to make the agenda of women's advancement a priority. Moreover, it is often the case that in considering women's challenges at country levels writ large, the particular challenges experienced by indigenous women are overlooked. This is important as, when one reviews the Endorois' struggle from a gendered perspective, it is clear that issues pertaining to women and their struggle voices are muffled.

Paul Goldsmith's case study of the Bajuni in Lamu is an exploration of the significance of Kenya's new constitution to the centre-periphery relationship that has been a common feature of Kenya's politics since colonialism. In the ferment of Swahili nationalism, the Kenyan coast presents multiple visions of citizenship contestations, which have defied past state mediation and continue to catalyse the emergence of quasi-separatist movements.

The discussion on how groups engage with opportunity structures and advocate for their rights is the subject taken up by Mukundi and Tuuli's chapter. In the context of the Endorois, the role of human rights non-governmental organisations (NGOs) within both the global south and north was crucial in helping the community consolidate its claim and engage with the ACHPR. While such collaboration is often amplifying of community concerns, the agendas and strategies of such non-state institutions often diverge at crucial stages of the advocacy process, creating either an enabling or disabling effect. It is the potential power asymmetries between north and south institutions that form part of the criticism earlier in the volume by Ndahinda on the origination of indigenous discourse in Africa.

Both Laura Young and Ridwan Laher in their chapters locate the indigenous question within the broader discourse of the politics of memory. In sum, they argue, the indigenous predicament can be viewed from the lens of collective trauma unresolved. Young reviews transitional justice processes in Rwanda, South Africa, Nigeria, Kenya and Morocco, and observes that the weak inclusion of indigenous communities' concerns is at the heart of the failure of these arrangements to result in social closure on key issues affecting governance in these countries. She argues that, by failing to afford targeted opportunities to the participation of insular groups, truth commissions privilege narratives from dominant groups and serve to maintain the rift between the state and communities on the margin. It is in this pursuit to extend 'the conceptual terrain of confronting the past to indigenous peoples in Africa' that Laher's paper offers theoretical footprints for researching the impact of dispossession on the collective psyche of communities, and proposes various frameworks through which current and past grievances can be channelled. An understanding of the chronic traumas occasioned upon communities is a necessary ingredient, he posits, to the democratic re-imagining of the nation-state in the continent. Without the boldness to confront the 'continuing past', the emergence of a plural continent that embraces its heterogeneity will continue to be undermined.

In a nutshell, this volume, while not prescriptive of a singular model for mediating the contested visions of statehood, is illustrative of the need to explore beyond common orthodoxies in the search for emancipatory narratives with which to respond to the socio-economic and political dilemmas of the continent. If the indigenous rights narrative will enable us, and we dig deeper into the pits of comparative law and politics, and wrest more principles that lend themselves better to the quest for equitable development and democratic inclusion, so be it.

NOTES AND REFERENCES

- 1 A number of peace treaties seem to have been entered into – particularly in Liberia and Sierra Leone – between various European colonial powers or their proxies and indigenous African communities. See, for example, Levitt, J., 2005. *The evolution of deadly conflict in Liberia: From 'paternalitarianism' to state collapse*. He records that treaties were entered into between indigenous groups in Liberia with both

- England and France, relating to peace and territorial transfers between 1885 and 1911. This should discount the notion that no treaties existed between colonisers and the colonised in Africa other than the Maasai. Compare with Miguel Alfonso Martinez (United Nations, 1997). Available at http://www1.umn.edu/humanrts/demo/TreatiesStatesIndigenousPopulations_Martinez.pdf
- 2 *Ole Njogo and Others v The Attorney General* Civil Case No. 91 of 1912 (E.A.P. 1914), 5 E.A.L.R. 70.
- 3 Westlake, J., 2005. Chapter on the Principles of International Law 110 (1894), cited in S. James Anaya, Divergent discourses about international law, indigenous peoples, and rights over lands and natural resources: Toward a realist trend. *Colorado University Journal of International Environmental Law & Policy*, 16, pp.237–238.
- 4 Hall, W.E., 1924. *A treatise on international law*, p.65 (Higgins, A.P. ed., 8th ed., cited in Anaya, p.21. The constitutive theory of statehood, however, stands in contrasts to the declaratory theory which posits that recognition is not the sine qua non for the existence of a state, but a state exists to the extent that it possesses certain objective attributes.
- 5 See, for example, *Western Sahara Case (Advisory Opinion)* 1975 ICJ Report 861975 ICJ Report 86. The court held that 'the concept of *res nullius*, employed at all periods, to the brink of the twentieth century, to justify conquest and colonization, stands condemned'. In the *Eastern Greenland (Denmark v Norway)* 1933 P.C.I.J (ser. AIR) No. 53 where Norway claimed possession of eastern Greenland on the basis of *terra nullius*, the Permanent Court of International Justice held that this doctrine was no longer applicable. Implicit within these decisions is the inference that the doctrine could be justifiably raised before this period.
- 6 Woods, T., 2005. *How the Catholic Church built Western civilization*. Washington, DC: Regenery, pp.5–6.
- 7 Anaya, supra note 3, p.11.
- 8 Austinian jurisprudence posits that to the extent that tribal society lacked 'a habit of obedience to one and the same superior', they lacked the concept of law which is the imprimatur of sovereignty. See, for example, Morrison, W.L. & Austin, J., 1982. London: Edward Arnold, p.151, discussed in McHugh, P.G., 2004. *Aboriginal societies and the common law*. New York: Oxford, p.150.
- 9 See, for example, *Calvin's Case* (1608) 7 *Coke's Rep* 1a, 77 ER 377. The laws of 'infidels', however, were contrary to Christianity and the law of nature, and so were immediately abrogated on colonisation. See also *Vajensingji v Secretary of State of India* (1924) LR 51 Ind. App 357 at 360 'where a territory is acquired by a sovereign state for the first time that is an act of the state. It matters not how the acquisition has been brought about. It may be by conquest, it may be by cession following on a treaty, it may be by occupation of territory hitherto unoccupied by a recognized ruler. In all these cases the result is the same. Any inhabitant of the territory can make good in the municipal courts established by the new sovereign only such rights as that sovereign has, through his officers recognized. Such rights as he had under the rule of predecessors avail him nothing'.
- 10 Section 25 of the Constitution of the Republic of South Africa provides that: '(6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress. (7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress'. This restitution project has faced tremendous criticism in the recent past. See, for example, Lahiff, E., 2001. *Land reform in South Africa: Is it meeting the challenge?* PLAAS. See more at <http://www.plaas.org.za/plaas-publication/PB01#sthash.TCwiDTWT.dpuf>
- 11 See, for example, Ngugi, J., 2002. The decolonization-modernization interface and the plight of indigenous peoples in post-colonial development discourse in Africa, 20 *Wis. Int'l L.J.*, p.297.

- 12 *Alexkor Ltd v Richtersveld Community*, Constitutional Court of South Africa, CCT 19/03, 2003.
- 13 Gloppen, S., Wilson, B.M., Gargarella, R., Skaar, E. & Kinander, M., 2010. *Courts and power in Latin America and Africa*.

Indigenous as equals under the African Charter

The Endorois Community versus Kenya

Cynthia Morel'

INTRODUCTION

On 2 February 2010, the African Union adopted the first ever indigenous land rights case to be decided by the African Commission on Human and Peoples' Rights (ACHPR).² The landmark victory is the culmination of 40 years of struggle led by the Endorois community, which in 1973 was dispossessed of the ancestral land it had occupied since time immemorial. Lake Bogoria, located in the heart of Kenya's Rift Valley, was to become a wildlife reserve. The failure to compensate the community with adequate grazing land following their eviction severely depleted their livestock. This, coupled with the failure to subsequently involve the Endorois in the management and benefit-sharing of the reserve, forced them into abject poverty. Crucially, the severed ties with their ancestral land not only threatened their socio-economic well-being but also their spiritual and cultural survival.

The *Endorois* case constitutes the first ruling before the African Commission to recognise indigenous peoples in the African context. Flowing from this recognition was the unprecedented legal recognition of collective rights to ancestral land under the Charter, along with related rights to natural resources. The case also constitutes the first ruling on the international stage to adjudicate on the right to development. This article serves to outline the key arguments presented before the Commission, and assesses the scope of its impact going forward.

INITIAL STEPS

The Endorois community first filed their legal claims before Kenya's domestic courts, challenging the manner in which the county councils responsible for the Lake Bogoria game reserve exercised their trusteeship.³ Pleadings before the domestic courts challenged

the allocation of revenues collected from the game reserve, the legality of the community's eviction, and the sustained denial of access to the reserve for the grazing of their animals, as well as for cultural and religious purposes.⁴ The community's unsuccessful bid before the Kenyan High Court was predicated upon the judiciary's finding that 'the law did not allow individuals to benefit from such a resource simply because they happen to be born close to the natural resource.'⁵ The court's related findings were equally out of step with international norms relating to indigenous peoples.

EXHAUSTION OF DOMESTIC REMEDIES

In its submissions on admissibility before the African Commission, the Endorois community argued that the massive nature of the violations and the lack of 'effective, available and efficient' remedies within the Kenyan domestic system absolved them from pursuing any further domestic recourse. In doing so, counsel drew on the Commission's jurisprudence that remedies existing at the domestic level must be '*available, effective and sufficient*',⁶ such that 'if the right is not well provided for, there cannot be effective remedies or any remedies at all'.⁷ A remedy is considered '*available* if the petitioner can pursue it without impediment', '*effective* if it offers a prospect of success' and '*sufficient* if it is capable of redressing the complaint'.⁸

In terms of availability, counsel first drew attention to the fact that, at the time of filing the case, collective notions of property were not recognised within the Kenyan Bill of Rights.⁹ Moreover, the trust land regime that formed the legal basis for the expropriation of the Endorois community afforded no legal protection with respect to beneficial ownership of their ancestral land. Although the vesting of radical title in the county councils was supposed to 'protect' this domain, expert opinions confirmed that the state or its agencies could effectively 'raid' such land without recourse to the stringent procedures of compulsory acquisition applicable to private land.¹⁰ Communities qua communities therefore remained deprived of legal (i.e. statutory) claims to the radical title of the land they occupied.

In addition to the above, the nature of the fundamental rights contained in the Constitution in force at the time of filing placed them squarely within the sphere of civil and political rights. Economic, social and cultural rights, such as the right to development (protected by Article 22 of the African Charter) or the right to cultural life (protected by Article 17 of the African Charter) – central to the community's claim – received no equivalent degree of constitutional protection. The community therefore argued that the possibility of bringing such grievances before the national courts was not available to them.

RECOGNITION

In addition to the inherent obstacles posed by the domestic legal framework, perhaps no element showcased the wider socio-political context within which the *Endorois* case emerged

than the issue of recognition as indigenous peoples. Kenya's refusal to recognise the Endorois community as an indigenous people through the course of the litigation process was categorical. Systematic refusal to register the Endorois Welfare Council, despite several attempts by the community over the course of a decade, was but one manifestation of this position.

The basis of Kenya's position was rooted in the view that the Endorois were in no way distinct from their neighbours. To this, they strenuously added that all individuals of African descent were indigenous to Africa – a belief upheld by a large number of African states during the final stages of the negotiating process surrounding the UN Declaration on the Rights of Indigenous Peoples (UNDRIP).¹¹ Kenya also maintained that recognition of the Endorois community as indigenous would lend them 'special rights', and that such recognition would thus prove discriminatory towards others. This again echoed the position of numerous other African states at the time of filing. Ultimately, the issue of recognition proved so contentious as to constitute the breaking point of negotiations towards a friendly settlement in September 2006, months prior to the final hearing on the merits of the case.

THE ENDOROIS AS INDIGENOUS PEOPLES

In response to the above, counsel for the Endorois underscored that the definition of 'peoples' had been recognised, both widely within international law and expressly by the African Commission's Working Group on Indigenous Populations/Communities (WGIP).¹² Furthermore, counsel pointed to the fact that, under international law, the existence of indigenous peoples in a given state did not depend upon a decision by that party, but was required to be established by subjective and objective criteria.¹³ Pleadings then drew upon the widespread consensus regarding self-identification as a fundamental criterion for determining to which groups the term 'indigenous' applies.¹⁴ It also drew on the broad criteria adopted by the WGIP, including its caveat that not all elements were required to be present at the same time in a given situation.¹⁵ The WGIP's underlying view was that 'a strict definition of indigenous peoples [was] neither necessary nor desirable.'¹⁶

With regard to the controversy surrounding the issue of distinctiveness, the Endorois community drew upon the WGIP's findings that the criteria of distinctiveness had to be measured in relation to the dominant or mainstream society and not vis-à-vis other indigenous peoples.¹⁷ Moreover, the applicants stressed that they could not be penalised for adopting new means of sustenance (such as small-scale farming), as this was a direct result of their traditional way of life being undermined. The changes were thus adopted under duress rather than out of choice.

DISPELLING THE MYTH OF SPECIAL RIGHTS

In response to government claims that special recognition was discriminatory, the applicants joined various experts in acknowledging that the term 'indigenous peoples' in the African context did not mean 'first inhabitants' as it did in the Americas and Australia, where native

communities were virtually exterminated by foreigners who confiscated their lands.¹⁸ In this regard, as the WGIP itself had recognised, all Africans were indeed indigenous to the continent. However, the human rights-related definition of indigenes that applied to the Endorois related to the sections of various African populations whose way of life and cultural survival depended on their ancestral land. In challenging misconceptions that lending effective protection to Africa's indigenous peoples would result in the enjoyment of special rights to the detriment of others, the WGIP emphatically stated that this was not the case.

The issue is not special rights. ... The issue is that certain marginalized groups are discriminated in particular ways because of their particular culture, mode of production and marginalized position within the state. This is a form of discrimination which other groups within the state do not suffer from. It is legitimate for these marginalized groups to call for protection of their rights in order to alleviate this particular form of discrimination.¹⁹

Government objections that such recognition would fuel discord were countered by drawing upon the WGIP's own findings that:

What rather creates conflict is that certain dominant groups force through a sort of 'unity' that only reflects the perspectives and interests of certain powerful groups within a given state, and which seeks to prevent weaker marginalized groups from voicing their particular concerns and perspectives. ... Conflicts do not arise because people demand their rights but because their rights are violated.²⁰

THE POWER AND SIGNIFICANCE OF RECOGNITION

In its first legal decision to recognise indigenous peoples, the African Commission acknowledged the severe consequences flowing from non-recognition. As a starting point, it responded to controversy over who represented the Endorois as being a natural consequence of the community's juridical personality not being recognised.²¹ Importantly, the Commission also dismissed any motion to deny the Endorois a right to juridical personality as a result of there being a lack of individual identification with their traditions and laws by some members of the community.²² Perhaps most crucially, however, the African Commission underscored the fact that the failure to recognise an indigenous/tribal group was intrinsically linked to the violation of their right to property.²³ Accordingly, the African Commission expressly acknowledged the fundamental importance of recognition for the realisation of this right and all others under the Charter. In this regard, the particular significance of the case cannot be overstated in the light of the long-held belief among African leaders that recognition of the distinct identities of minorities constituted a threat to national unity and undermined the objective of nation building.²⁴ In sharp contrast to that position, the African Commission instead sent a clear message that 'good governance' in fact depended on authorities factoring in – and accommodating – the interests of minority groups. The lasting effect is one of empowerment for those who, for generations, have been voiceless and powerless to protect their ancestral lands and way of life.

RELIGIOUS FREEDOM (ARTICLE 8)

Lake Bogoria is of central religious significance to the Endorois. Since time immemorial, they have used its sacred grounds – the resting place of their ancestors – for key cultural and religious ceremonies, such as weddings, funerals, circumcisions and traditional initiations.

In their submissions, the Endorois argued that by evicting them from their land and refusing them access to the lake and other surrounding religious sites, the Kenyan authorities had interfered with their ability to maintain their religious practices. In a further violation, it was argued that the Kenyan state had failed to properly demarcate or protect religious sites within the game reserve. As a result, sites of immense religious and cultural significance were damaged, degraded or destroyed.²⁵

THE RIGHT TO PRACTISE RELIGION

The freedom to worship and to engage in ceremonial acts has been recognised as the central key pillar of religious freedom. Echoing UN Human Rights Committee findings, the Endorois' submissions stressed that:

The concept of worship extends to ritual and ceremonial acts giving direct expression to belief, as well as various practices integral to such acts, including the building of places of worship, the use of ritual formulae and objects, the display of symbols and the observance of holidays and days of rest.²⁶

The submissions further drew upon the Proposed American Declaration on the Rights of Indigenous Peoples, which had been approved by the Inter-American Commission on Human Rights in 1997. Its provisions recognised the specific needs of indigenous communities and the right to practise their spiritual beliefs as an individual and collective human right,²⁷ as well as the right (for indigenous peoples) to use their sacred and ceremonial areas and the right of expression in accordance with their values, usages, customs, ancestral traditions, beliefs and religions.²⁸ It also placed an obligation upon the state to encourage universal respect for the integrity of indigenous spiritual symbols, practices, sacred ceremonies, expressions and protocols.²⁹

NO JUSTIFICATION FOR INTERFERENCE

Article 8 of the African Charter provides that states may interfere with religious practices 'subject to law and order'. The Endorois argued that their religious practices did not pose a threat to law and order, and that consequently there was no justification for the interference.

Submissions further drew on the Commission's findings in *Amnesty International v Zambia* to underscore that limitations placed on the state's duties to protect rights must not be interpreted against the principles of the Charter, and in particular that 'recourse to [claw-back clauses] should not be used as a means of giving credence to violations of the express provisions of the Charter'.³⁰ Accordingly, it was argued that the Commission's reading of the

underlying principles of the Charter had to be in keeping with international law's recognition of ancestral land as the fundamental basis of indigenous peoples' spiritual life.³¹

Submissions further stressed that the principle of proportionality required that a restriction on a right had to be the least restrictive possible to meet the legitimate aim. The fact that Lake Bogoria constituted the sole site of religious significance to the Endorois – a site that could not be replaced by worship and practice at an alternative location – called for significantly strong justifications as to the necessity of encroaching on the community's religious rights. These justifications also needed to be read in conjunction with the Commission's prior jurisprudence, which viewed restrictions on the freedom to practise one's religion as needing to be as *minimal as possible*.³² In the present case, the applicants successfully refuted the claim that their expulsion and the continued denial of access to their ancestral land for religious ceremonies were a minimal encroachment on the right to worship.³³ The Commission further rejected that the Endorois' continued denial of access constituted a legitimate step in pursuit of economic development or environmental protection.³⁴ The denial of access was thus found to be in violation of Article 8 of the Charter.

CULTURAL RIGHTS (ARTICLE 17(2) AND 17(3))

Along with the violation of their religious freedom, the Endorois community argued that the denial of access to Lake Bogoria upon the creation of the game reserve threatened the community's cultural survival. The community further argued that their eviction, which forced them onto semi-arid land devoid of medicinal saltlicks and other vital resources for the health of their livestock, undermined the very essence of their way of life. The inextricable link between culture and indigenous peoples' relationship to land consequently formed the basis of the community's submissions before the Commission.

In pursuing this line of argument, submissions first drew on WGIP findings, which recognised dispossessions of land and natural resources as 'a major human rights problem for indigenous peoples'.³⁵ This was followed by WGIP's additional emphasis that dispossession 'threatens both the economic, social and *cultural survival* of indigenous pastoralist and hunter-gatherer communities'.³⁶

Submissions equally drew on the authoritative writings of former UN Special Rapporteur Erica-Irene Daes, which highlighted the difficulty in separating 'the concept of indigenous peoples' relationship with their lands, territories and resources from that of their cultural differences and values. The relationship with the land and all living things is at the core of indigenous societies'.³⁷

RIGHTS AND OBLIGATIONS IN RELATION TO CULTURE

To enjoy one's culture, practise one's religion and use one's language cannot be done if the group no longer exists. In this light, the Endorois community argued that protection of

indigenous peoples' cultural existence included the protection of their physical existence, the existence of the territories on which they live, and access to the material resources required to maintain their existence on those territories.³⁸

It was further argued that protection of existence goes beyond the duty not to destroy or deliberately weaken indigenous or minority groups, but 'requires respect for and protection of their religious and cultural heritage essential to their group identity, including buildings and sites such as libraries, churches, mosques, temples, synagogues and the like.'³⁹ This sought for an interpretation of Article 17 that recognised both the dual nature of culture in its individual and collective dimensions, protecting on the one hand the individual's participation in the cultural life of his community, and on the other hand obliging the state to promote and protect traditional values recognised by a community.

Pleadings drew further attention to the distinctive African interpretation of cultural rights under Article 17(3), which amplifies the state's responsibility for cultural rights protection.⁴⁰ This responsibility was urged to be in line with the overall duty to respect, protect and fulfil the realisation of economic, social and cultural rights as understood in international human rights law. In the context of cultural rights, this included the duty to tolerate diversity;⁴¹ to take positive steps towards protecting identity groups;⁴² and to create policies, institutions or other mechanisms that allow for different cultures and ways of life to exist, develop and prosper.⁴³

Positive obligations towards indigenous communities were urged to be of particular importance given the extent to which their livelihoods and cultures had been traditionally discriminated against. This, along with their lack of legal recognition and empowerment, was recognised by the Special Rapporteur on the rights of indigenous peoples to reflect the severity of their social, political and economic marginalisation.⁴⁴

PROPORTIONALITY

Unlike Article 8, Article 17 does not contain any clause allowing for restrictions on cultural rights under the African Charter. Counsel for the Endorois argued that the absence of such a clause served as a strong indication that the drafters of the Charter envisaged few, if any, circumstances in which it would be appropriate to limit a people's right to culture. Counsel further argued that if any form of restriction did exceptionally apply, the limitations in question would be required to be proportionate to a legitimate aim.⁴⁵

In applying the above principles to the facts of the case, submissions stressed that the cultural activities of the Endorois community posed no harm to the ecosystem of the reserve. The restriction of cultural rights could not therefore be justified on such a basis. In addition, the practice of Endorois cultural ceremonies could not be considered to affect the profits of the game reserve. In fact, human interest in the cultural authenticity of the Endorois culture was argued to present a greater tourist attraction, a factor enhanced only by the community's willingness to co-exist peacefully with the game reserve.⁴⁶

FINDINGS

In its findings, the Commission acknowledged the absence of any claw-back clause under Article 17, and that even if the creation of the game reserve had constituted a legitimate aim, the state's failure to secure access for the celebration of the cultural festival and rituals could not be deemed proportionate to that aim.⁴⁷ The Commission further held that the cultural activities of the Endorois community posed no harm to the ecosystem of the game reserve, and the restriction of cultural rights therefore could not be justified, especially as no suitable alternative was given to the community.⁴⁸

The Commission also held that by forcing the community to live on semi-arid lands without access to medicinal saltlicks and other vital resources for the health of their livestock, Kenyan authorities had created a major threat to the Endorois' pastoralist way of life.⁴⁹ As such, the Commission maintained that the very essence of the Endorois' right to culture had been denied, rendering the right, to all intents and purposes, illusory. Accordingly, Kenya was found to have violated Article 17(2) and (3) of the Charter.

PROPERTY RIGHTS (ARTICLE 14)

At the time of filing the case, the viability of submitting a collective land claim under Article 14 of the Charter remained an open question. While the Charter protected the rights of peoples, the right to property was categorised among individual rights provisions. The primary task at hand was therefore to seek formal recognition that the rights, interests and benefits of indigenous communities in their traditional lands constituted 'property' under the Charter.

NEXUS BETWEEN RECOGNITION AND FORMAL TITLE

The failure to recognise the legal personality of indigenous peoples, referenced earlier in this chapter, is inextricably linked to the lack of 'formal' title recognition of ancestral lands commonly experienced by indigenous groups. In countless instances, this unfortunate combination has resulted in forced displacement from indigenous lands. In Kenya, the Trust Land regime that purported to preserve indigenous land on behalf of communities offered little protection against such evictions. In the case of the Endorois, it in fact formed the legal basis for the expropriation of the community's land, affording them no legal protection with respect to beneficial ownership of their ancestral land.⁵⁰

In response to this reality, submissions initially pointed to WGIP findings, which identified 'collective tenure [as being] fundamental to most indigenous pastoralist and hunter-gatherer communities'.⁵¹ Counsel then drew on the leading international case at the time of filing, *Mayagna (Sumo) Awas Tingni v Nicaragua*, which had recognised the framework of communal property as falling within the scope of Article 21 of the American Convention on Human Rights.⁵² In a crucial departure from formal title, the Inter-American Court had further

accepted that *possession* of the land should suffice for indigenous communities lacking real title to obtain official recognition of that property and for consequent registration.⁵³ This was especially the case if indigenous peoples had fled from their ancestral lands as a result of acts of violence perpetrated against them.⁵⁴ Importantly, these advances in the *Awasi Tigni* case had been secured in spite of the American Convention on Human Rights being originally intended for the sole protection of individual rights.⁵⁵ The applicants were therefore optimistic that a similar interpretation would be lent to Article 14 under the Charter.

PUBLIC NEED OR IN THE GENERAL INTEREST

While acknowledging that the establishment of a game reserve constituted a legitimate aim, and that it served a public need, the Commission found that the community's complete eviction and sustained denial of access to its ancestral land was disproportionate to the purpose sought.⁵⁶ Accordingly, it held that the creation and management of the reserve could have been accomplished by alternative means, proportionate to the means.⁵⁷ The Kenyan government's failure to act in accordance with its own laws in matters of compensation also factored in the Commission's finding of a violation of Article 14, as did the failure to adequately consult.⁵⁸

OWNERSHIP VERSUS ACCESS

Of pivotal importance for the effective implementation of the Endorois' right to property was the ability to successfully highlight the crucial distinction between the right of ownership over that of access. Guarantees of access were strenuously argued to deprive indigenous peoples of the necessary leverage to engage with the state and third parties as active stakeholders. At best, access only afforded the scope for them to be passive beneficiaries. Rights of access were further argued to devolve at the pleasure of the authorities, with such discretion historically having been deployed incompatibly with security of tenure for indigenous peoples. In this regard, counsel drew on emerging standards to press upon the Commission that only formal ownership of the land could guarantee indigenous peoples' effective protection of their rights under Article 14.⁵⁹ Finally, counsel argued that, in order to render the rights effective in practice, indigenous territory had to be duly demarcated and titled within a set timeline. This process was required to take place with the full participation of the community in a manner that took into account its customary laws, values, customs and mores.⁶⁰

EFFECTIVE REMEDIES

The Commission's ruling found that the Kenyan authorities failed to act in accordance with the principles set out under Article 14. As such, it held that the government's 'expropriation and the effective denial of ownership amounted to an infringement, or encroachment, of Endorois'

right to property’.⁶¹ It further held that the government had ‘a duty to recognize the right to property of members of the Endorois community, within the framework of a communal property system, and establish the mechanisms necessary to give domestic legal effect to such right’.⁶² Importantly, it accepted the applicants’ submissions that title be granted for their permanent use and enjoyment of the lands, as well as to ensure that they could engage with the state and third parties as active stakeholders rather than passive beneficiaries.⁶³ The Commission equally called upon the state to delimit and demarcate the land in consultation with the community.⁶⁴

On the issue of restitution, the Commission called on Kenya to provide the Endorois community with restitution of their ancestral lands.⁶⁵ In line with arguments submitted by the applicants, it recognised that failure to reconstitute had to be predicated on objective and reasonable grounds, and that in cases where restitution was impossible, alternative lands of equal extension and quality could be surrendered.⁶⁶ The ‘impossibility’ of restituting Endorois land was rejected on the basis that: (a) the contested land was the site of a conservation area, and the Endorois – as the ancestral guardians of that land – were best equipped to maintain its delicate ecosystems; (b) the Endorois were prepared to continue the conservation work begun by the government; (c) no other community had settled on the land in question, and even if this were the case, the respondent state would be obliged to rectify that situation;⁶⁷ (d) the land had not been spoliated and was thus inhabitable; and (e) continued dispossession and alienation from their ancestral land continued to threaten the cultural survival of the Endorois’ way of life, a consequence which clearly tipped the proportionality argument in favour of indigenous peoples under international law.⁶⁸

RIGHT TO NATURAL RESOURCES (ARTICLE 21)

The right of all peoples to the free disposition of wealth and natural resources is an absolute right. As the Charter makes explicit, ‘[i]n no case shall a people be deprived of it’. In affirming the gravity of consequences flowing from the violation of these right, submissions highlighted the WGIP’s findings that:

Dispossession of land and natural resources is a major human rights problem for indigenous peoples ... The establishment of protected areas and national parks has impoverished indigenous pastoralist and hunter-gatherer communities, made them vulnerable and unable to cope with environmental uncertainty and, in many cases, even displaced them ... This [the loss of fundamental natural resources] is a serious violation of the African Charter (Article 21(1) and 21 (2)), which states clearly that all peoples have the right to natural resources, wealth and property.⁶⁹

It is against this backdrop that the Endorois community articulated the breaches to which they had been subjected from the time of their eviction, which prevented them from accessing vital resources. The resources in question included medicinal saltlicks and fertile soil, both

instrumental in the survival of their livestock. Concessions for prospective ruby mining in 2003 later threatened the community's sole remaining fresh water source. Critically, these concessions were allocated without consulting the community, obtaining its consent or sharing any of the benefits. The community had also been denied benefits generated by the revenues and employment created by the game reserve.

SCOPE AND PUBLIC-INTEREST TEST

Notwithstanding the interdependence between the right to property and the right to natural resources under the Charter, counsel for the Endorois argued that Article 21 was wider in its scope than Article 14, as it upheld the right to *use* natural resources, even where peoples did not have title to the land. Submissions suggested that the two articles did nonetheless converge on the public-interest threshold applicable in the case of encroachment upon indigenous land. On this basis, pleadings relating to both articles drew emphatically upon the following principle established by Erica Daes, former Special Rapporteur of the United Nations Sub-Commission for the Promotion and Protection of Human Rights:

Limitations, if any, on the right to indigenous peoples to their natural resources must flow only from the most urgent and compelling interest of the state. Few, if any, limitations on indigenous resource rights are appropriate, because the indigenous ownership of the resources is associated with the most important and fundamental human rights, including the right to life, food, the right to self-determination, to shelter, and the right to exist as a people.⁷⁰

The Commission's assessment of proportionality in the *Endorois* ruling expressly drew upon this threshold.⁷¹ The interpretation of 'a much higher threshold' applying to indigenous land was held to be particularly relevant in instances of potential spoliation and/or development of the land in question.⁷²

SUBSOIL RESOURCES

On the controversial issue of subsoil resources, the Endorois community drew on emerging jurisprudence from the Inter-American system, which emphatically stressed that 'the right to use and enjoy their territory would be meaningless in the context of indigenous and tribal communities if the said right were not connected to the natural resources that lie on and within the land'.⁷³ Additional case law was then drawn upon to press upon the Commission that 'the natural resources found on and within indigenous and tribal people's territories that are protected ... are those natural resources traditionally used and necessary for the very survival, development and continuation of such people's way of life'.⁷⁴

The Commission relied upon the above standards in its assessment of Article 21, pointing to its direct relevance given that ruby-mining concessions on the community's ancestral land

had poisoned the only remaining water source to which the Endorois had access.⁷⁵ While it held that rights of indigenous peoples over their natural resources were not absolute, it maintained that the extraction of minerals not traditionally used by indigenous peoples still raised the obligation to consult with them if the effects of such activities could negatively impact on the resources upon which their survival depended.⁷⁶ This included the duty to perform sound environmental and social impact assessments prior to the commencement of a project. In the absence of the Kenyan authorities carrying out such duties, or sharing in the benefits of the mining concessions, the Commission found a violation of Article 21.⁷⁷ The Commission further stressed state obligations under Article 21(2) of the Charter in cases of a violation by spoliation, which required both restitution and compensation.⁷⁸ Spoliation had been argued by the Endorois as meaning the ‘the taking of a benefit properly belonging to another’.⁷⁹

RIGHT TO DEVELOPMENT (ARTICLE 22)

The *Endorois* case is the first to have any international human-rights body adjudicate on the right to development. This provided counsel with the unique opportunity to shape the scope of the right under the Charter. As a starting point, counsel argued that recognising the right to development required the fulfilment of five main criteria. Development was required to be equitable, non-discriminatory, participatory, accountable and transparent. It was further argued that the income or other benefits derived from development had to be equally distributed.⁸⁰ Consequently, economic growth alone did not fully realise the right to development. In keeping with this, counsel for the community emphasised Arjun Sengupta’s view that ‘[f]or economic growth to be included as an element of the claims representing the right to development, it must satisfy the basic condition of facilitating the realization of all other rights. ... In other words, policies adopted to increase economic growth must be consistent with human rights standards’.⁸¹

Most crucially, reliance was placed upon the writings of Nobel laureate Amartya Sen, who had conceptualised economic, social and cultural development as an increase in overall well-being.⁸² Sen had developed a framework where the realisation of the right to development was to be measured in terms of increased capabilities, and in turn the extent to which the range of choice had increased for the beneficiary.⁸³ On this basis, submissions to the African Commission articulated the right to development as being comprised of two essential sub-components: the right to participate in the development process, and the right to a substantive improvement in well-being. Within this framework, development was therefore conceptualised as a ‘right to a process that expands the capabilities or freedom of individuals to improve their well-being and to realize what they value’.⁸⁴ In the context of indigenous peoples, it was argued that the right to development was required to protect the resources essential for the surviving and well-being of these communities. With these being so inextricably linked to their traditional land use systems,⁸⁵ counsel argued that control over land was therefore crucial to ensuring the right to development.

RIGHT TO CONSULTATION, AND WHERE APPLICABLE, A DUTY TO OBTAIN CONSENT

The dual principles of choice and increase of capabilities were further argued to raise obligations of effective participation, meaningful consultation, as well as securing free, prior and informed consent.⁸⁶ The Kenyan authorities' longstanding refusal to recognise the Endorois as a people drastically undermined their ability to participate effectively in the development process of their community. This, coupled with their forced eviction under duress, further undermined their right to a substantive improvement in well-being. The Endorois therefore found themselves to be in a significantly worse position at the time of filing the case than if they had not been evicted from their ancestral land.

Submissions to the Commission argued that the duty to consult required the state to both accept and disseminate information, and that the process entailed constant communication between the parties. In addition, consultations were required to be conducted in good faith, through culturally appropriate procedures and with the objective of reaching an agreement. Furthermore, requirements to consult with indigenous peoples extended to doing so at the *early stages* of a development or investment plan, rather than being resorted to only when the need arose to obtain approval from the community, if such were the case. An additional obligation cited included that of raising awareness among community members of possible risks, including environmental and health risks, in order for the proposed development or investment plan to be accepted knowingly and voluntarily. Finally, submissions emphasised that consultations with indigenous peoples should take into account their traditional methods of decision making.⁸⁷ The Endorois stressed that consultations with them failed to meet any of the aforementioned parameters. Instead, community members were informed of the impending project as a *fait accompli*, and thus denied any opportunity to shape the policies or their role in the game reserve.

PROHIBITION AGAINST COERCION, PRESSURE OR INTIMIDATION

Further on the issue of consultation, counsel argued that the duty to foster effective participation and obtain informed consent without placing pressure on communities to accept an unsatisfactory settlement was vital for the realisation of the right to development. This line of argumentation was supported by various sources, including by a report produced for the UN Working Group on Indigenous Populations, which required that 'indigenous peoples are not coerced, pressured or intimidated in their choices of development'.⁸⁸ As such, to be legally effective, consent had to be given freely.

Against this backdrop, it was argued that the Kenyan authorities violated the Endorois' right to development by engaging in coercive and intimidating activity that abrogated the community's right to meaningful participation and freely given consent. In the original consultations, the elders did not believe that they could bargain equally with the Kenyan authorities and receive a better settlement. They felt that they were under duress to accept the project drawn up on the Kenyan authorities' terms.⁸⁹

BENEFIT SHARING

Submissions on this issue first drew on the Special Rapporteur on the rights of indigenous peoples' emphasis that, in order to guarantee 'the human rights of indigenous peoples in relation to major development projects, [states should ensure] mutually acceptable benefit-sharing'.⁹⁰ Counsel further argued that the right to development 'impl[ied] providing for the equality of opportunity or capabilities, which could translate to equitable distribution of income or amount of benefits'.⁹¹ The Endorois, as beneficiaries of the development process, were entitled to an equitable distribution of the benefits derived from the game reserve – which never came to fruition.

During the course of litigation, the Kenyan authorities refuted allegations of failing to uphold their obligations with respect to benefit sharing on the basis of various proceeds from the game reserve having been used to finance projects benefiting the community. While noting that this was not contested by the Endorois, the African Commission nevertheless rejected the authorities' discretionary spending as a substitute for adequate benefit sharing.⁹² Equitable benefit sharing, by definition, did not depend on the discretion of the authorities, or on related handouts, nor could the spending on basic infrastructure be construed as being conditional upon the game reserve generating proceeds – such spending constituted a state obligation towards all citizens of Kenya, regardless of their proximity to (or ownership of) natural resources.⁹³

RIGHT OF PROCESS AND OUTCOME

In sum, the right to development was argued as being both *constitutive* and *instrumental*, or useful both as a means and as an end. The African Commission's ruling accepted this, along with the suggestion that a violation of either the procedural or the substantive element would constitute a violation of the right to development.⁹⁴ Accordingly, the Kenyan government's failure to include the Endorois community in the development process and its related benefits raised a violation of Article 22.⁹⁵

THE TRANSFORMATIVE IMPACT OF THE *ENDOROIS* RULING

The *Endorois* case has been widely acknowledged as a landmark ruling. Its role in securing the recognition of indigenous peoples as rights holders, as well as establishing the right of protection over collective land rights, constitutes a significant turning point for communities across Africa who have been systematically dispossessed as a result of colonial and post-colonial policies. These advances, along with the strong affirmation of the right to development under the Charter, strike at the very heart of trust land regimes by affirming indigenous peoples as active stakeholders – rather than passive beneficiaries – in the management of the resources essential to their socio-cultural and economic survival. By affording indigenous

communities these rights, the case has helped address the power imbalances that have long denied them access to justice as a result of their minority status and the historic discrimination that they have suffered.

In Kenya, the impact of the case was made evident from the very outset. For instance, the simple act of filing the case promptly halted the arbitrary arrests commonly experienced by members of the community since the time of their eviction. Moreover, the issuance of provisional measures in 2004 engaged the highest political structures in the country, and ultimately resulted in the halting of the mining process that was commencing within the disputed land. An imminent conflict between the community and investors was consequently averted. The case has further served to generate concrete change on the ground for members of the community by securing regular access to the game reserve for the watering of their animals, as well as for cultural and religious ceremonies. While this constitutes important progress, it is equally indicative of how the full and effective restitution of their ancestral land remains a lengthy work in progress. UNESCO's own flouting of the ruling by inscribing Lake Bogoria on its World Heritage list – despite the community's repeated objection at not having been consulted on the matter – only further emphasises the magnitude of the remaining task ahead. Notwithstanding such challenges, the African Commission's ruling is indicative of a willingness to render the Charter effective for minorities and indigenous peoples across the African continent.

Beyond the case's immediate impact on the community itself, the *Endorois* case became known as 'the rallying call in the context of the campaign for a new constitution' during the course of its litigation.⁹⁶ The adoption of this new constitution, which has effectively abolished the trust land regime and created a new tenure arrangement based on communities, has been recognised as one of the greatest policy gains to date for minorities in Kenya.⁹⁷ Significantly, the new constitution's provision for an enforcement mechanism within the National Land Commission that is mandated to 'initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress' comes at a time where dozens of other indigenous communities across Kenya and beyond have begun bringing their own claims before justice.⁹⁸ The vast majority of these claims are said to draw on the gains of the *Endorois* case.⁹⁹ Thanks to effective advocacy and media outreach within Kenya, a greater number of communities have approached the Endorois with a view to assisting in the implementation of the recommendations of the African Commission.

The *Endorois* case is also said to have generated considerable interest among a broad range of national institutions that had not traditionally addressed indigenous or minority rights issues within Kenya despite actively engaging on wider human-rights issues. Specific examples include the National Environmental Management Authority as well as the Department of Mining. The World Bank also invoked its policy No. 4.10 on indigenous people in relation to a water project that it was funding in Lower Mau, which would affect the Endorois.¹⁰⁰ The European Union, for its part, has funded civic education to enable the Endorois community to monitor local governance processes. In doing so, it has joined hands

with the Kenyan state, which itself has specifically targeted the improvement of education infrastructure in proximity to the Endorois community.

The lasting significance of the case can further be substantiated by the ample attention it has received from various UN mechanism and mandate holders including the UN Special Rapporteur on the Human Rights and Fundamental Freedoms of Indigenous Populations, the UN Human Rights Committee, as well as the Committee on Economic Social and Cultural Rights. The UN Permanent Forum on Indigenous People has equally taken note of the *Endorois* case, and monitors the progress of its implementation. African-based institutions, including the Peer Review Mechanism by NEPAD, have also been said to issue broad policy recommendations in relation to minority rights on the basis of the *Endorois* case.

More broadly, one of the potential effects of recognising indigenous peoples' collective rights to property is that 'it may force technologically advanced majority societies throughout the world to examine critically their economic policies and philosophies, many of which are based on over consumption'.¹⁰¹ The importance of identifying solutions is particularly acute as competing land-use interests between agriculturalists, mining companies, wildlife services and wider foreign investment projects intensify. It is arguably even more critical as China dramatically increases its pursuit of natural resources across the continent, in areas often inhabited by indigenous communities.

History tells us that an overt failure to facilitate equitable access to land and natural resources – or to encourage benefit-sharing solutions – will not only undermine the sustainability of communities but sharply increase the risk of conflict.¹⁰² At the centre of many of such conflicts is the state's failure to formulate responsive mechanisms that would facilitate respectful consultations with minorities and indigenous people, and recognise their collective rights.¹⁰³ As such, while the *Endorois* case sets a vital precedent against the forced acquisition of indigenous land by government and its agencies, perhaps the truest test of the case's legacy will be measured by the willingness, ability and ultimate success of states to adhere to the ruling's due process requirements. Critical to this call for action is taking advantage of the transitional and developing legal contexts in countries such as Kenya, Uganda and South Sudan to develop coordinated responses and strategies.¹⁰⁴ In this respect, the *Endorois* case should be regarded as a valuable starting point and means to a greater – and as yet undetermined – end.

NOTES AND REFERENCES

- 1 Cynthia Morel served as co-counsel for the *Endorois* case as founding legal officer, and later senior legal advisor to Minority Rights Group International's strategic litigation programme. She continues to be involved in the case's implementation, in conjunction with her roles as Special Advisor to the Singapore Management University's Asian Peace-building and Rule of Law Programme.
- 2 The African Commission on Human and Peoples' Rights will be referred to interchangeably as the ACHPR, the African Commission, or the Commission throughout this paper.

- 3 Sing'Oei, K., 2011. Engaging the leviathan: National development, corporate globalisation and the Endorois' quest to recover their herding grounds. *International Journal on Minority and Group Rights*, 18, pp.515–540 at p.524.
- 4 *William Ngasia and Others v Baringo County Council and Others*, High Court Miscellaneous Civil Case No. 183 of 2000. The Endorois filed this application in the High Court (Nakuru), under section 84 of the (former) Kenyan Constitution. The High Court heard the case on 19 August 2000 and delivered the judgment on 19 April 2002.
- 5 *William Ngasia and Others*, supra note 4; see also Sing'Oei, supra note 3.
- 6 *Sir Dawda K Jawara v The Gambia*. Communication 147/95 and 149/96, African Commission on Human and Peoples' Rights at para. 31.
- 7 *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria*. Communication 155/96, African Commission on Human and Peoples' Rights, at para. 37.
- 8 *Sir Dawda K Jawara v The Gambia* at para. 32. Counsel also drew on case law from the European Court of Human Rights, which upheld this principle (e.g. *Stögmüller v Austria*. Case 1602/62 (Admissibility Decision) at para. 11). On effectiveness, counsel cited the European case of *Deweert v Belgium* (Case 6903/75 at para. 29), which stressed that effective protection must offer a remedy for the act itself, rather than relieving the *consequences* of an act.
- 9 Protection against the deprivation of property was covered in Chapter V, S. 75 of the Constitution of the Republic of Kenya (1963). The Chapter specifically outlines protection extending to the 'Fundamental Rights and Freedoms of the *Individual*' [emphasis added].
- 10 Expert opinion by Professor Okoth-Ogendo in relation to the *Endorois* case, submitted to the African Commission on Human and Peoples' Rights in September 2006 (on file with author). Ogendo pointed to the county councils and/or the President being granted the power under sections 117 and 118 of the (now former) Constitution read together with sections 7–13 of the Trust Land Act (cap. 288) to 'set apart' such land for purposes not always in the interest of communities occupying it.
- 11 Draft Aide Memoire, African Group, United Nations Declaration on the Rights of Indigenous Peoples, 9 November 2006, New York. Importantly, the vast majority of African states revised their position, and ultimately voted in favour of the UN Declaration. Kenya (along with Nigeria and Burundi) abstained. No African states voted against the Declaration.
- 12 The WGIP's 2005 report dedicated a specific section to the issue of definitions (from p.86). Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities, submitted in accordance with the 'Resolution on the Rights of Indigenous Populations/Communities in Africa', adopted by the ACHPR at its 28th Ordinary Session.
- 13 See General Comment No. 23: The rights of minorities (Art. 27): 08/04/94. CCPR/C/21/Rev.1/Add.5, General Comment No. 23 at para. 5.2.
- 14 See ILO Convention 169, Article 1(2) [emphasis added]. The WGIP 2005 report (supra note 11) also formally recognises the fundamental importance of self-recognition at p.93.
- 15 Criteria included the occupation and use of a specific territory; the voluntary perpetuation of cultural distinctiveness; self-identification as a distinct collectivity, as well as recognition by other groups; and an experience of subjugation, marginalisation, dispossession, exclusion or discrimination. WGIP Report, 2005, p.93.
- 16 *Ibid.*, p.87.
- 17 *Ibid.*, p.89.
- 18 See Response note to the 'Draft Aide Memoire of the African Group on the UN Declaration on the Rights of Indigenous Peoples', Presented by an African group of experts, 21 March 2007, para. 2.4.

- 19 WGIP, 2005, pp.86–88, as reflected also in the WGIP's 2006 report, pp.11–12.
- 20 WGIP, 2005, p.88 [emphasis added].
- 21 *Minority Rights Group International and the Centre for Minority Rights Development (on behalf of the Endorois Welfare Council) v Kenya*. Communication 276/2003, African Commission on Human and Peoples' Rights, paras 192–193. Referred to hereafter as the '*Endorois case*'.
- 22 Ibid., para. 162.
- 23 Ibid., paras 192–193. This position echoed that of Okoth-Ogendo, as outlined in his expert opinion (supra note 9), which emphasised the link between African communities' lack of juridical persona and their inability to legally hold land (and indeed any property) directly. He pointed to this belief not only being legislated in Kenya, but also in Malawi, Zimbabwe, South Africa and Namibia, wee als highlighted belwoare–page editor] among other British colonial possessions. He further underscored that: 'At independence, denial of juridical persona to communities remained an important rationale in the interpretation of the nature of African land rights even as the scope of individual ownership was expanded. Thus the trusteeship system continued.'
- 24 The first signs of an emerging shift in this mindset were made evident through the adoption of normative instruments such as the 1994 Declaration on a Code of Conduct for Inter-African Relations (Assembly of Heads of State and Government, 30th Ordinary Session, Tunis, Tunisia, 13–15 June 1994). Paragraph 4 read as follows: 'We reaffirm our deep conviction that friendly relations among our peoples as well as peace, justice, stability and democracy, call for the protection of ethnic, cultural, linguistic and religious identity of all our people *including national minorities* and the creation of conditions conducive to the promotion of this identity' [emphasis added].
- 25 This argument had drawn on the (then) Draft UN Declaration on the Rights of Indigenous Peoples, which emphasised that 'states shall take effective measures, in conjunction with the indigenous peoples concerned, to ensure that indigenous sacred places, including burial sites, be preserved, respected and protected'. Article 13, U.N. Doc. E/CN.4/Sub.2/1994/2/Add.1 (1994).
- 26 General Comment No. 22: The right to freedom of thought, conscience and religion (Article 18): 30/07/93, para. 4.
- 27 By virtue of Article 60 of the African Charter, which mandates the Commission to 'draw inspiration from international law on human and peoples' rights', counsel cited Article 2, *Proposed American Declaration on the Rights of Indigenous Peoples*, Approved by the Inter-American Commission on Human Rights on 26 February 1997, at its 1 333rd session, 95th regular session: 'Indigenous people have the collective rights that are indispensable to the enjoyment of the individual human rights of their members. Accordingly the states recognize inter alia the right of the indigenous peoples to collective action, to their cultures, to profess and practice their spiritual beliefs and to use their languages'.
- 28 Ibid., Article 14.
- 29 Ibid., Article 10.
- 30 *Amnesty International v Zambia*, Communication 212/98, African Commission on Human and Peoples' Rights.
- 31 Leading standards within the Inter-American system in this regard maintained that 'the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of ... their spiritual life ... For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy'. *The Mayagna (Sumo) AwasTingni Community v Nicaragua*, Judgment of 31 August 2001, Inter-American Court of Human Rights, (Ser. C) No. 79 (2001), para. 149.
- 32 *Amnesty International v Zambia*, Communication 212/98, African Commission on Human and Peoples' Rights, paras 82 and 80.

- 33 *Endorois* case, *supra* note 20, para. 172.
- 34 *Ibid.*, para. 172.
- 35 WGIP Report, 2005, *supra* note 11, p.20.
- 36 *Ibid.*, p.20.
- 37 Daes, E-I., 2001. Special Rapporteur. *Indigenous Peoples and their Relationship to Land*. Commission on Human Rights, UN Doc. E/CN.4/Sub.2/2001/21, para. 13.
- 38 Murray, R. & Wheatley, S., 2003. Groups and the African Charter on Human and Peoples' Rights. *Human Rights Quarterly*, 25, p.222.
- 39 Eide, A., 2003. Cited in Murray, R. & Wheatley, S. Groups and the African Charter on Human and Peoples' Rights. *Human Rights Quarterly*, 25, p.222.
- 40 Shyllon, F., 1998. The right to a cultural past: African viewpoints, in *Cultural Rights and Wrongs*. UNESCO.
- 41 *Duty to respect*: UN Committee on the Elimination of Racial Discrimination, General Recommendation XXIII, (Fifty-first session, 1997), Rights of Indigenous Peoples, U.N. Doc/A/52/18. Article 4(a) mandates that states '[r]ecognize and respect indigenous distinct culture, history, language and way of life as an enrichment of the State's cultural identity and to promote its preservation'. See also Article 27 of the International Covenant on Civil and Political Rights: '[M]inorities shall not be denied the right, in Community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language'; Article 15(1)(a) International Covenant on Economic, Social and Cultural Rights. See also Principle 2 (Trust and Respect) of the Dana Declaration on Mobile Peoples and Conservation, 2003.
- 42 *Duty to protect*: UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, Article 4(2): 'States shall take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs; CERD General Recommendation XXIII'; Article 4(e): 'Ensure that indigenous communities can exercise their rights to practise and revitalize their cultural traditions and customs and to preserve and to practise their languages'; International Covenant on Economic, Social and Cultural Rights, Article 15(3).
- 43 *Duty to fulfil*: Human Rights Committee, General Comment 23, (50th session, 1994), U.N. Doc. CCPR/C/21/Rev.1/Add.5, Article 27 (1994), para. 7 states: 'with regard to the exercise of the cultural rights protected under Article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them'. See also Principle 4 (Adaptive Management) and Principle 5 (Collaborative Management) of the Dana Declaration on Mobile Peoples and Conservation, 2003.
- 44 *Endorois* case, *supra* note 20, para. 245. See also the Report of the Special Rapporteur (Rodolfo Stavenhagen) on the Situation of Human Rights and Fundamental Freedoms of Indigenous People on Implementation of General Assembly Resolution 60/251 of 15 March 2006, A/HRC/4/32/Add.3, 26 February 2007: 'Mission to Kenya' from 4 to 14 December 2006.
- 45 *The Constitutional Rights Project Case*, Communication 60/91, African Commission on Human and Peoples' Rights, para. 42.
- 46 Key case law relied upon in the context of cultural included the cases of *Sandra Lovelace v Canada*, Human Rights Committee, Communication No. 24/1977, U.N. Doc. CCPR/C/OP/1 at 10, (1985), para. 15 (Analogy between Lovelace's Reserve being the only place in existence where she could enjoy her culture,

and Lake Bogoria holding the same central importance to the Endorois); *Chief Bernard Ominayak and the Lubicon Lake Band v Canada*, Human Rights Committee, Communication No. 167/1984, U.N. Doc. CCPR/C/38/D/167/1984 (1990), para. 33 (Case cited in relation to the need for protection of indigenous culture in the face of development imperatives); *Länsman et al. v Finland*, Communication No. 511/1992, U.N. Doc. CCPR/C/52/D/511/1992 (1994). (Drawn upon in relation to criteria for determining whether development projects are compatible with cultural rights. This particular case examined whether logging concessions infringed upon indigenous peoples' traditional practice of reindeer husbandry. The UN Human Rights Committee clearly stated that development imperatives could not deny the right to enjoy culture (para. 9.4). It further held that the state has a duty to protect and fulfil cultural rights in its consideration of development projects (para. 9.8).

47 *Endorois* case, supra note 20, para. 249.

48 *Ibid.*, para. 249

49 *Ibid.*, para. 251.

50 Trust Land Act, Cap. 288 of 1963.

51 Report of the African Commission's Working Group of Experts, submitted in accordance with the Resolution on the Rights of Indigenous Populations/Communities in Africa, Adopted by the African Commission on Human and Peoples Rights at its 28th ordinary session (2005).

52 *Awes Tingni* case, supra note 29.

53 *Ibid.*, para. 151.

54 Case of the *Moiwana Community v Suriname*. Inter-American Court of Human Rights, Judgment of 15 June 2005. Series C, No. 124, para. 134.

55 Key cases to follow the *Awes Tingni v Nicaragua* and *Moiwana v Suriname* rulings (supra notes 29 and 53) included *Yakye Axa v Paraguay*, Judgment of 17 June 2005, Series C, No. 116; *Sawhoyamaya Indigenous Community of the Enxet People v Paraguay*, Judgment of 29 March 2006, Series C, No. 125; and *Saramaka People v Suriname*, Judgment of 28 November 2007, Series C, No. 172.

56 The African Commission maintains that any limitations on rights must be proportionate to a legitimate need, and should be the least-restrictive measures possible. In the present communication, the African Commission holds the view that in the pursuit of creating a game reserve, the respondent state has unlawfully evicted the Endorois from their ancestral land and destroyed their possessions. It is of the view that the upheaval and displacement of the Endorois from the land they call home and the denial of their property rights over their ancestral land is disproportionate to any public need served by the game reserve.

57 *Endorois* case, supra note 20, para. 215.

58 Serious questions were also raised with regard to the legality of the extinguishment of the community's rights over their ancestral land. The Endorois' rights over Lake Bogoria could have been legally dissolved (under the now repealed Trust Land Act) had the president of Kenya set the land apart, and published this in the *Kenyan Gazette*. Neither condition had been met.

59 This principle was drawn from the case of *Saramaka People v Suriname* (supra note 54), where the Inter-American Court has held that, rather than a privilege to use the land, which can be taken away by the state or trumped by the real property rights of third parties, members of indigenous and tribal peoples must obtain title to their territory in order to guarantee its permanent use and enjoyment. This title must be recognised and respected, not only in practice but also in law, in order to ensure its legal certainty (para. 115).

60 Drawing explicitly on principles set out in the *Awes Tingni* case (supra note 29) para. 165 and the *Saramaka* case (supra note 54) para 115, which clearly stipulates that 'a strictly juridical or abstract

recognition of indigenous lands, territories or resources lacks true meaning where the property has not been physically established and delimited’.

61 *Endorois* case, *supra* note 20, para. 199.

62 *Ibid.*, para. 196.

63 *Ibid.*, paras 204 and 206.

64 *Ibid.*, para. 206.

65 *Ibid.*, paras 209 and 234.

66 *Ibid.*, para. 234. This normative standard is reflected in various instruments, including the UN Committee on the Elimination of Racial Discrimination’s General Recommendation 23 (1997). In this General Recommendation, CERD called upon states to ‘[r]ecognise and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return these lands and territories. *Only when this is for factual reasons not possible*, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories’ [emphasis added].

67 Indeed, at para. 140 of the *Sawhoyamaza Indigenous Community v Paraguay* case (*supra* note 54), the Inter-American Court stresses that: ‘Lastly, with regard to the third argument put forth by the State, the Court has not been furnished with the aforementioned treaty between Germany and Paraguay, but, according to the State, said convention allows for capital investments made by a contracting party to be condemned or nationalised for a “public purpose or interest”, which could justify land restitution to indigenous people. Moreover, the Court considers that the enforcement of bilateral commercial treaties negates vindication of non-compliance with state obligations under the American Convention; on the contrary, their enforcement should always be compatible with the American Convention, which is a multilateral treaty on human rights that stands in a class of its own and that generates rights for individual human beings and does not depend entirely on reciprocity among States.’

68 *Endorois* case, *supra* note 20, para. 235.

69 Report of the African Commission’s Working Group of Experts (2005), *supra* note 11, p.20.

70 Ghanea, N. & Xanthaki, A., 2005, (eds). *Indigenous peoples’ right to land and natural resources*, in Daes, E-I., *Minorities, peoples and self-determination*. Martinus Nijhoff.

71 *Endorois* case, *supra* note 20, para. 265.

72 *Ibid.*, para. 256.

73 *Saramaka* case, *supra* note 54, para. 122 [emphasis added].

74 *Ibid.*, paras 122–124.

75 *Endorois* case, *supra* note 20, para. 262.

76 *Ibid.*, paras 265 and 266.

77 *Ibid.*, para. 268.

78 *Endorois* case, *supra* note 20, para. 268.

79 *Black’s law dictionary*, 2004.

80 Sengupta, A., 2003. ‘Development cooperation and the right to development’. Francois-Xavier Bagnoud Center Working Paper No. 12. Available at http://www.hsph.harvard.edu/xfbcenter/working_papers.htm

81 Sengupta, A., 2002. Independent Expert, 5th Report of the Independent Expert on the Right to Development, Commission on Human Rights, U.N. Doc. E/CN.4/2002/WG.18/6 (2002).

- 82 Sen, A., 2000. *Development as freedom*. Sources drawn upon for the elaboration of the framework presented to the African Commission also drew on the Review of the Progress in the Promotion and Impact of the Right to Development: Considerations of the Report of the High Level Task Force on the Impact of the Right to Development, Commission on Human Rights, U.N. Doc.E/CN.4/2005/WG.18/2 (2001).
- 83 Ibid.
- 84 Sengupta, A., 2001. Third Report of the Independent Expert on the Right to Development, E/CN.4/2001/WG.18/2 2 January 2001. Additionally, in its 2000 Human Development Report, the UNDP articulated an understanding of development based on choice and capacity: 'Human Development, in turn, is a process of enhancing human capabilities – to expand choices and opportunities.' United Nations Development Programme, *Human Development Report 2000*, (2000), p.2.
- 85 The Inter-American Commission on Human Rights noted in 1997, for example, that: 'For many indigenous cultures, continued utilization of traditional collective systems for the control and use of territory are essential to their survival, as well as to their individual and collective well-being. Control over the land refers both to its capacity for providing the resources which sustain life, and to the geographical space necessary for the cultural and social reproduction of the group'. Report on the Situation of Human Rights in Ecuador, OEA/Ser.L/V/II.96 doc.10, rev.1 (1997), para 115.
- 86 For 'Effective participation and meaningful consultation', see applicants' merits brief at paras 246–258. For standards on 'Prior, informed consent', see merits brief at paras 259–263. For the related standards on 'Prohibition against coercion, pressure or intimidation', see merits brief at paras 264–268.
- 87 Drawn heavily from Saramakapara, 133. On informed consent, we also drew on CERD General Recommendation 23 at para. 4(d), and See Concluding Observations of the Committee on the Elimination of Racial Discrimination, Costa Rica, U.N. Doc. CERD/C/60/CO/3 (2002), para 13; Concluding Observations of the Committee on the Elimination of Racial Discrimination, United States, U.N. Doc. A/56/18 (2001), paras 380–407; Concluding Observations of the Committee on the Elimination of Racial Discrimination, Australia, U.N. Doc. CERD/C/30/4/Add.101, (2000); *Mary and Carrie Dann v USA* (2002), para. 136.
- 88 Motoc, A-I. & the Tebtebba Foundation, 2004. Preliminary working paper on the principle of free, prior and informed consent of indigenous peoples in relation to development affecting their lands and natural resources that they would serve as a framework for the drafting of a legal commentary by the Working Group on this concept. U.N. Doc. E/CN.4/Sub.2/AC.4/2004/4 (2004), para. 14(a).
- 89 Drawn from Centre for Minority Rights Development and Minority Rights Group International consultations with the community in November 2003.
- 90 As cited in Yakye, para. 140.
- 91 Sengupta, A., 2000. *Development cooperation and the right to development*. Francois-Xavier Bagnoud Center Working Paper, 2000. Available at http://www.hsph.harvard.edu/fixbcenter/working_papers.htm. Also drawn on the case of *Mahuika et al. v New Zealand* (1992).
- 92 *Endorois* case, supra note 20, paras 254–256.
- 93 Ibid., para. 298.
- 94 Ibid., 277.
- 95 Ibid., 298.
- 96 As stated by Korir Sing'Oei (also co-counsel to the Endorois case) in *The Endorois' Legal Case and its Impacts on State and Corporate Conduct in Africa* (2011). Advances cited in the two subsequent paragraphs were further outlined in Sing'Oei's paper.
- 97 Chapter 5 of the Constitution of Kenya (August 2010) effectively recognises 'community land' as being equal to public and private land. The recognition of community land is further reiterated in Kenya's newly adopted Land Policy (Section 3.3.1.2), adopted in August 2009.

98 Section 67(2)(e) of the Constitution of Kenya (2010).

99 These communities include the Ilchamus, Ogiek and Nubians. Despite the latter not being indigenous, leaders indicated that the Endorois increased their confidence in also succeeding before the African Commission.

100 2010.

101 Khamala, C., 2011. Land policies in East Africa: The impact of the Endorois case on Kenyan law reforms. *International Conference on Land Policies in East Africa*, 2–4 November 2011, University of Kampala.

102 See Young, L. & Sing'Oei, K., 2011. *Land, livelihoods and identities: Inter-community conflicts in East Africa*. Minority Rights Group International.

103 Ibid., p.32.

104 Ibid., p.32

2

Historical development of indigenous identification and rights in Africa

Dr Felix Ndahinda

INTRODUCTION

There is a growing consensus within mainstream human rights scholarship and activism that considers some communities of hunter-gatherers and pastoralists as indigenous peoples of Africa. Hunter-gatherer groups such as the San-Basarwa of southern Africa, the Batwa-Pygmyes of Central Africa and a number of hunter-gather communities in East Africa (Ogiek, Hadza, Awee), and also nomadic pastoralist communities including the Maasai, Boran, Rendille, Turkana, Karamojong and Mbororo, have endorsed the indigenous identity and sought recognition and protection under this legal framework. Since the end of the 1980s, a number of representatives from these communities have enlisted in a global movement advocating for recognition and protection of indigenous rights on the continent. Since (self-) identification of particular communities as indigenous peoples is a result of local and global dynamics (as this inquiry will show), there seems to be no exhaustive list of groups who consider themselves or are considered indigenous in Africa. A list compiled by the African Commission on Human and Peoples' Rights (ACHPR) and the International Working Group of Indigenous Affairs (IWGIA) names 59 different indigenous groups across 26 African countries.¹ However, other sources show that a larger number of countries and groups increasingly feature on listings of indigenous peoples in Africa.²

The case for recognition and protection of indigenous rights in Africa builds on the idea that claimant communities share experiences of subjugation, marginalisation, dispossession, exclusion or discrimination with other indigenous peoples worldwide.³ In essence, indigenous rights activism in Africa echoes global indigenous discourses over colonial and post-colonial injustices, historical marginality and the pressing need for empowerment measures that enhance claimant communities' rights to self-determination. Claimant indigenous groups frequently feature in various reports as communities threatened by extinction unless positive steps are taken to reinstate their historical right over ancestral lands and to maintain their

differing socio-political, economic and cultural (including religious) institutions.⁴ Self-identification, special connection with ancestral lands and a professed determination to safeguard differing socio-political, economic, cultural and religious systems against threats of the development-modernisation project of the state are the dominant features of global indigenous rights activism.

This chapter documents the genesis of indigenous identification and the evolution of the indigenous rights movement in Africa. The inquiry attempts to find out when, how and why particular communities in Africa became involved in the global indigenous rights movement. The analysis primarily focuses on dynamics which, since the end of the 1980s, has led to the enrolment of (representatives from) particular ethno-cultural communities in the global indigenous movement. The inquiry further takes into consideration the contrasted landscapes under which notions of indigeness, autochthony or aboriginality – whether used to mean the same or with differential nuances – are formulated. The adoption of this wider perspective in tracing the rather recent dynamics of indigenous identification and indigenous rights activism in Africa builds on the idea that ‘indigeness’ and related concepts such as ‘aboriginality’, ‘autochthony’, ‘nativism’ and ‘authentic sons of the soil’⁵ have a long history within the African socio-legal and political landscape. Accordingly, any in-depth inquiry into the contemporary dynamics of identification of particular communities as constitutive of indigenous peoples in Africa can hardly ignore the historically differing constructions of indigeness on the continent.

THE EMERGENCE OF INDIGENOUS IDENTIFICATION AND RIGHTS IN AFRICA

HISTORICAL CONCEPTUALISATION OF INDIGENESS IN AFRICA

Advocacy for the recognition and protection of indigenous rights in Africa has generally adopted a narrow focus on indigeness as construed under the global indigenous rights movement. In a way, it overlooks the somewhat ambiguous history of the concept as applied to particular identities as well as the competing usage of indigeness, aboriginality or autochthony to capture realities that do not necessarily fall within the conceptual frame of contemporary indigeneity. Relatively recent dynamics within the global indigenous movement – such as the creation of the United Nations Permanent Forum on Indigenous Issues, the adoption of the United Nations Declaration on the Rights of Indigenous Peoples in 2007 or the adjudication of indigenous rights within the Inter-American and the African human (and peoples’) rights systems – have generally downplayed the importance of the definition debate over who is indigenous and who is not.⁶ Yet beyond – and even within – the very limited circles of indigenous rights activists and academics, there appears to be a very limited understanding of the substance of contemporary indigenous identification and indigenous rights in Africa. There are persistent ambiguities over the relevance and coherence of the central themes of indigenous discourses – namely aboriginality; special connection to ancestral lands; and

socio-political, economic and cultural marginality – when applied to at least some claimant indigenous communities in multi-ethnic African countries.

Historically, the concept is used in reference to socio-cultural communities that are the original inhabitants of specific lands or territories.⁷ The UN Chairperson-Rapporteur Mrs Daes rightly noted that

the international discussion of the concept of concept of 'indigenous' evolved, from the late nineteenth century until the establishment of the Working Group in 1982 ... English and Spanish share a common root in the Latin term *indigenae*, which was used to distinguish between persons who were born in a particular place and those who arrived from elsewhere (*advenae*). The French term *autochtone* has, by comparison, Greek roots and, like the German term *Ursprung*, suggests that the group to which it refers was the first to exist in the particular location. Hence, the semantic roots of the terms historically used in modern international law share a single conceptual element: priority in time.⁸

The ambiguities underlying the application of the concept within the African context lie in the fact that since the colonial encounter (mostly) during the second half of the nineteenth century,⁹ the 'indigenous' attribute has been used with differing – and indeed evolving – meanings. The concept was initially used by European colonisers to describe some African 'racial' groups considered as the original inhabitants of Africa. It was subsequently applied under the colonial institutional and legal regimes to all pre-colonial inhabitants of demarcated colonies.¹⁰ Finally, it is currently being appropriated by, or applied to, some ethno-cultural communities considered as historically, politically and socio-economically marginalised within the states or wider geographic regions where they live.¹¹

Socio-anthropological and historical studies conducted during the early years of the colonial encounter ascribed indigenosity to those 'races' considered as authentically African. Numerous studies attempted to document the origin and describe the migratory waves of pre-colonial inhabitants of the African continent¹² by reproducing questionable myths, theories and archaeological data on human settlement on various parts of the continent.¹³ Historical, ethnological and anthropological studies classified the various African 'tribes' into racial groupings. Numerous, but not always consistent, typologies were proposed, dividing African populations into Negrilloes-Bushmen, the Bantu-Negroes, the Nilo-Hamites and the Semites, and further elaborated on their respective origin and migrations throughout the continent.¹⁴ Subsequent classifications of pre-colonial African populations subdivided them into Pygmoid, Bushmanoid, Negroid, Caucasoid and Mongoloid races.¹⁵ Reconstructions of migrations of various 'races' throughout history from the cradles of their civilisations to current settlements popularised the narrative of relative anteriority of some groups over others on occupied lands or territories.¹⁶ Ceuppens and Geschiere credited the French for being the first to introduce and institutionalise the concept of autochthony in Africa 'at the time of the colonial conquest of Sudan in the late nineteenth century'.¹⁷

Pygmoid and Bushmen groups were generally considered to be the first inhabitants of the eastern, central and southern African lands and territories where they lived.¹⁸ Their territories,

the narrative goes, were subsequently conquered by the more powerful Bantu who migrated southward and westward from their Niger-Cameroon birthplace more or less two millennia ago.¹⁹ The Hamitic hypothesis added to the narrative the idea that, throughout several centuries, pastoral communities expanded southward through successive waves of migration from their original homelands in the Nile valley (if not Caucasia or Arabia, according to some accounts) and progressively subjugated the aboriginal inhabitants of east Africa (Pygmoid and Bushmanoid) and central Africa (Pygmoid and Bantu).²⁰ Most of the studies, however, acknowledged that the boundaries between these groups were far from clearly demarcated since they intermingled throughout the recorded history of their interactions, leading to the emergence of new identities and civilisations. This reading of the history of human settlement in various parts of Africa popularised the historical theories upon which contemporary constructions of indigenouness on the continent are erected. Hunter-gatherer communities historically grouped under the Pygmy, Bushmen and related categories became known as the authentic aboriginal inhabitants of many parts of sub-Saharan Africa.²¹ Since the Bantu were described as the quintessential representatives of the Negro race,²² they were also considered to be relatively more indigenous than the 'Caucasoid' Nilo-Hamites and Semites.²³ The latter were generally referred to as alien races of newcomers who, depending on specific territories, conquered and subjugated indigenous Pygmy, Bushmen or Bantu races.²⁴

The consolidation of colonialism on the African continent reshaped the socio-political and legal conceptualisations of indigenouness. For instance in French and Belgian colonies, the socio-political and legal regimes for *les indigènes* covered all ethno-cultural groups falling under the territorial jurisdiction of specific colonies.²⁵ More generally, the concept 'indigenous' was used to cover a wide range of realities and institutions considered as authentically African, in opposition to imports from mainly Europe or other continents.²⁶ Pre-colonial systems and structures in British, Portuguese and Spanish colonies in Africa (and Asia for that matter) were similarly captured through the lenses of indigenouness.²⁷ The general applicability of the concept is evidenced by Article 22 of the Covenant of the League of Nations whose use of terms such as 'peoples not yet able to stand by themselves', 'natives' and 'indigenous populations' clearly refers to all pre-colonial inhabitants of territories subjected to the mandate system.²⁸ During most of the African colonial era and long after the decolonisation process, indigenouness in Africa came to be defined in opposition to European colonisation and settlement. In the same vein, indigenisation came to represent the 'process by which a government limits participation in a particular industry to citizens of the country, thus forcing alien owners to sell'.²⁹ Eventually, the popularised theories and myths about human settlement in various corners of Africa were domesticated, and perpetuated the relative conceptions of indigenouness of some ethno-cultural groups over others.

The emergence of identity politics in Africa against the backdrop of the democratisation process and the civil society revolution that accompanied the end of the Cold War revived the language of relative autochthony of some groups over others.³⁰

Indigenouness became not only a legal framework for empowerment of particularly marginalised communities but also a rallying concept for political mobilisation by self-styled

autochthones against individuals or groups considered as not belonging to the land.³¹ A number of studies have shown that the language of autochthony played a significant role in igniting conflicts or societal tensions in, among others, countries such as Ivory Coast, the Democratic Republic of the Congo, Rwanda, Burundi, Uganda and Cameroon.³² The co-existence of these two articulations of indigeness coupled with the limited clarity in indigenous discourses as applied to Africa complicates the popularisation of the indigenous movement on the continent. However, in spite of the theoretical weaknesses of the contemporary indigenous rights movement in Africa, activism for recognition and protection of indigenous rights on the continent has gained ground tremendously over the last decade.

A TALE OF TWO JOURNEYS: CHIEF GEORGE MANUEL AND LAZARO MORINGE PARKIPUNY

In 1971, the president of the National Indian Brotherhood Grand Chief George Manuel travelled to Tanzania where he met the country's President Julius Nyerere and asked for his assistance in addressing the plight of 'Indian' people in Canada.³³ This was around the time when Manuel was involved in the mobilisation of Canada's aboriginal communities and was seeking global support against Prime Minister Pierre Trudeau's proposed policies of dissolution of Indian nations and their assimilation into the rest of society.³⁴ Like many other newly independent African countries, Tanzania was then considered as a successful example of the application of the right to self-determination. His exchanges with President Nyerere and also with Mbuto Milando, a first secretary of the Tanzanian High Commission in Canada 'strongly influenced his conceptualisation of an "indigenous Fourth World", which lies at the heart of the global indigenous peoples' movement'.³⁵

Manuel's visit to Tanzania, New Zealand, Australia and Sweden, among other places, inspired his subsequent work for indigenous self-organisation at the local level and the pursuit of global solidarity between indigenous peoples. He eventually co-founded the *World Council of Indigenous Peoples* in 1975, and spent the remaining part of his life championing indigenous rights domestically and internationally.³⁶

In the early 1980s, nearly two decades after George Manuel's visit, Lazaro Moringe Parkipuny – a Tanzanian member of parliament – embarked on a journey in the opposite direction.³⁷ A vocal activist for the rights of his pastoralist Maasai community, Parkipuny's contact with Indian communities in the United States at the end of the 1970s instrumentally influenced his subsequent enrolment in global indigenous rights activism.³⁸ He participated in indigenous rights events and networks in Europe and North America in the 1980s, and eventually became the first African representative to attend – alongside a fellow Tanzanian participant from the Hadzabe community – and speak before the United Nations Working Group on Indigenous Populations (UNWGIP) in 1989.³⁹

One year earlier, members of mainly pastoral communities including the Maasai had been evicted from the Mkomazi Game Reserve, a measure presented by the government and conservationists as necessary to avoid the degradation of the game's biodiversity.⁴⁰ Enrolment in global indigenous fora was therefore intended to garner international solidarity and support

in addressing the real and pressing issues of marginality, dislocation and the demise of traditional modes of subsistence. The substance of Parkipuny's address to the UNWGIP during this initial participation captured not only the cause and grievances of his Maasai community but rather the overall situation of African communities in similar conditions as the Maasai. His expressed wish for increased participation of claimant indigenous representatives from the African continent materialised in subsequent years. Numerous other representatives from hunter-gatherer, pastoralist and other communities living by (small-scale) agriculture and fishing progressively enlisted in the indigenous movement.

These two personal experiences epitomise the dynamics of indigenous identifications as well as the dilemmas of domestic recognition of indigenous rights in particular African countries. At the time of the visit of George Manuel to Tanzania, socio-political discourses in Africa were still dominated by the language of collective liberation from European colonial domination and oppression. In most cases, elites from various ethno-cultural communities under British, French, Portuguese or Spanish colonial rule joined their forces in a common struggle for independence. Nyerere's Tanzania was particularly praised for succeeding where most other multi-ethnic African countries had failed in finding some form of balance between nation building and respect for the country's ethno-cultural diversity.⁴¹

Following his Tanzanian journey, George Manuel wrote: '[o]f all models of economic and social development that I have seen, Tanzania is the closest example to my understanding of the way that the Indian people want to develop'.⁴² The irony in the role played by Tanzania as an inspirational model for George Manuel's indigenous Fourth World lies in the fact that the socio-political and economic system promoted by Nyerere discouraged expressions of ethno-cultural distinctiveness in the public arena.⁴³ The *Ujamaa* policy (translated as 'familyhood' or 'African socialism') promoted by Nyerere advocated the 'indigenisation' of socio-political and economic structures of the state by fostering the unity of the country's 120 to 130 different ethnic groups and encouraging their participation.⁴⁴ Under *Ujamaa* policy, 'the articulation of particularistic group interests [was] inconsistent with the norms of the national ideology'.⁴⁵ The imposition and promotion of Swahili in all spheres of public life (Swahilisation) coupled with the establishment of village councils (villagisation) contributed to the progressive deconstruction and weakening of traditional or colonially institutionalised customary rules.⁴⁶ A strong nationalism that promoted national unity and downplayed – without forcibly suppressing – ethno-cultural differences was a result of a political project that envisioned a polity erected upon a synthesis of positive attributes (supposedly) shared within pre-colonial African systems. In retrospect, the contemporary indigenous rights movement characterised by an emphasis on ethno-cultural distinctiveness would hardly choose the Tanzanian society created by Nyerere as an exemplary case.

The emergence of indigenous rights and also the proliferation of differential identity politics in Africa by the 1990s was a culmination of the failure policies – championed by leading figures of independence such as Julius Nyerere and Kwame Nkrumah of Ghana, among others – aimed at instituting strong unitary states and continental integration through the suppression of differential ethno-cultural identities. Most governing elites in post-colonial

Africa instituted sectarian and repressive policies that privileged some identities while suppressing others. Suppressed and marginalised communities include claimant indigenous groups in Africa. Next to advocacy for recognition of distinctive identity, contemporary indigenous activism in Tanzania and other African countries seeks to redress patterns of marginality rooted in pre-colonial but mostly colonial and postcolonial states.

THE DEVELOPMENT OF THE INDIGENOUS RIGHTS MOVEMENT IN AFRICA

THE CONVERGENCE OF LOCAL AND GLOBAL AGENDAS

The genesis of the indigenous identification and rights in Africa clearly displays a convergence between local and global agendas. As in other parts of the world, the end of the Cold War was accompanied by a wind of democratisation that not only challenged the prevailing one-party system in most African countries but also contributed to the rise of (ethnic) nationalisms.⁴⁷ Numerous socio-political organisations emerged with differing demands and agendas. Many such organisations derived their relative success from the idea that they were grassroots movements whose non-governmental position (civil society) enabled them to engage governments in bringing about transparency and democratic accountability.⁴⁸ They embraced different socio-political causes, including the promotion of the rights and interests of particular communities based on ethnicity, religion, territoriality or modes of production.

Ethno-cultural communities suffering from political, social and economic marginality particularly resorted to ethnic mobilisation in pursuit of collective empowerment. The adoption of the language of indigenous rights is therefore one among other expressions of differential identities.⁴⁹ The globalisation of indigenous rights advocacy towards the end of the 1980s and beginning of the 1990s culminated in the adoption by representatives from such communities (mostly hunter-gatherers and pastoralists) of indigenous rights narratives in framing their grievances.⁵⁰ The role of local actors – such as Parkipuny – in enlisting their organisations or communities into the global indigenous movement cannot be underestimated. However, through mobilisation and financial support, international actors and institutions played a determinant central role in shaping the dynamics of indigenous identification on the African continent.⁵¹ Strong involvement by global actors in campaigns for recognition of indigenous rights contributed to the progressive domestication of the underlying narratives by elites from claimant African indigenous groups.

The crystallisation of indigenous identification has remained elusive due to three main challenges. First of all, far from being a result of grassroots initiatives, the initial involvement of African representatives in global indigenous networks was a product of the expansion of the global indigenous movement to Africa. Additionally, the enrolment of communities from the African continent in the global indigenous rights movement occurred at a relatively late stage in the global expansion of the indigenous rights movement. Finally, as the section below shows, African and global actors advocating for recognition and protection of indigenous

rights on the continent have usually embraced causes stretching beyond the boundaries of indigeness, making it quite intricate to dissociate the substance of indigenous claims from general human rights activism.

THE (EARLY) AMBIGUITIES IN DOMESTICATION OF INDIGENESS IN AFRICA

The Copenhagen-based IWGIA was one of the earliest organisations that took the lead in stirring up indigenous rights identification and promoting recognition of indigenous rights in Africa.⁵² From the outset of its involvement on the continent, the organisation noted the controversial character of the exclusive appropriation of the 'indigenous' attribute by some African ethno-cultural groups. Accordingly, IWGIA took a more 'pro-active role than had been the case in Asia South and Central America'⁵³ in bringing Africa into the global indigenous movement. Beyond playing a role in the background, IWGIA was at the forefront of what it euphemistically calls 'indigenous self-organisation' in Africa.⁵⁴ Dahl provides a compelling account of how, in the 1980s, a number of anthropologists with IWGIA ties endorsed indigenous rights activism in framing problems faced by mainly hunter-gatherer and pastoralist communities in Africa.⁵⁵ From the early 1990s, IWGIA became increasingly involved in mobilising and (financially) facilitating participation of African representatives in global indigenous fora.⁵⁶ The author singles out the publication of Knutsson's *Report from Eritrea* in 1971 to illustrate IWGIA's interest in indigenous issues on the continent since the organisation's inception.⁵⁷ However, he acknowledges that more than a decade passed before a second publication – analysing the interaction between the Maasai and the Tanzanian state with a particular focus on the demise of, and pressure on, their pastoral way of life – was issued.⁵⁸ From then onwards, the situation of particular African collectives gradually featured in regular or specific IWGIA publications.⁵⁹

Early IWGIA publications of relevance to the African continent displayed ambiguities over the delineation of indigeness as a concept applicable to specific ethno-cultural identities. For instance, in the very few pages dedicated to (northern, east and southern) Africa, the *IWGIA Yearbook 1986* estimated that there were some 12 550 000 indigenous peoples on the continent.⁶⁰ This publication highlighted a number of contemporaneous human rights concerns in a number of countries but managed to map only five indigenous groups – Sahrawi, Wollega,⁶¹ Turcana (sic), Maasai and San Bushmen – whose overall population could hardly total the above estimate of indigenous peoples in Africa.⁶² The *IWGIA Yearbook 1988*, celebrating the twentieth year of existence of the organisation, enriched the listing of indigenous peoples in Africa. Four broad categories were mentioned: North African nomadic peoples (8 million); East African nomadic peoples (6 million); Pygmies (200 000) and San-Basarwa/Bushmen (100 000).⁶³ These figures were regularly reproduced in subsequent studies until the early 2000s.⁶⁴ Publications over this period failed to coherently delineate the boundaries of indigeness in Africa. Admittedly, there was already an evident tendency to consider hunter-gatherer and nomadic pastoralist communities as constitutive of indigenous peoples. Groups such as the San-Bushmen, the Maasai and the Barabaig appear in nearly every report intended to capture the situation of

indigenous people in Africa, yet a focus on some other situations displayed a lack of coherence in the inclusion of groups within the indigenous rights framework.

For instance, the Sahrawi were included in early IWGIA listings of indigenous peoples in Africa.⁶⁵ Their struggle for self-determination (in the form of independence) since Western Sahara was annexed by Morocco is generally viewed under the lens of territorial liberation from foreign occupation – along the lines of the decolonisation movement in Africa – instead of striving for recognition by differential ethno-cultural identity.⁶⁶ Similarly, the inclusion of Eritrea in indigenous discourses during the early years of IWGIA activities embodies certain ambiguities. For more than three decades, Eritrea waged a war of independence against Ethiopia until it was formally recognised by the United Nations as a separate state upon a referendum in 1993 organised after the fall of the Mengistu regime in 1991.⁶⁷ Eritrean accession to independence was more a territorial exercise of sovereignty based on colonially delineated boundaries than an expression of self-determination motivated by historical, ethno-cultural or religious attributes shared by all Eritreans. The country is inhabited by nine different ethnic groups whose traditional modes of production predominantly consist of (nomadic) pastoralism, agro-pastoralism and farming.⁶⁸ As recently as in 2009, a report commissioned by the ACHPR and the International Labour organisation (ILO) acknowledged that identifying any of the Eritrean groups as ‘indigenous’ was a ‘difficult task, and may lead to differences of views and controversies’.⁶⁹ The report noted the absence of self-identification of any Eritrean community as ‘indigenous’.⁷⁰ While acknowledging the relative dominance of large groups such as the Tigrinya and the Tigre – totalling more than 80 per cent of the national population – over all other ethnic groups, the report noted the similarity between the traditional lifestyles of all these communities as well as the gradual merging of ethnic identities in some (mainly urban) localities.⁷¹ The conclusions of the report theoretically imagined a scale of indigeneness whereby three, then five ethno-cultural groups could be considered as indigenous in Eritrea. It argued that the

Kunama and Nara meet the criteria of long-standing settlement, social stigmatisation, economic marginalisation, and – albeit to a declining extent – dependence on their land for the survival of their culture and ways of life. Although the Tekurir have no claim to long-term settlement, they most clearly meet the criterion of marginalisation. On a sliding scale of indigenity, these three groups would be followed by the Afar, the Bilen, the Hedareb, the Rashaida and the Saho.⁷²

Clearly, Eritrea represents an appealing illustration of the challenges involved in determining indigeneness in multi-ethnic African countries.⁷³

Finally, references to Rwanda and Burundi in early IWGIA reports displayed ambiguities over the contextual meaning and relevance of indigeneness at the time. For instance, the 1988 and 1990 IWGIA yearbooks summarily listed the Hutu/Tutsi alongside a number of claimant indigenous communities in Africa.⁷⁴ Arguably, mass violence and rising human rights concerns in the two countries over this period motivated their inclusion in IWGIA reports. In relatively recent years, indigenous activism enlisted the often neglected and

historically marginalised third group, the Twa representing less than one per cent in either country, instead of the Hutu and the Tutsi in global indigenism.

THE EXPANSION OF INDIGENOUS IDENTIFICATION

Theoretical conceptualisation of contemporary indigenism in Africa emerged around the early 1990s. In an introduction to a comparatively short section dedicated to Africa in the *IWGIA Yearbook 1990*, Wæhle summed up the debates over indigenous identification on the continent.⁷⁵ His analysis pointed out the limited usage of the concept on the continent, except in relation to nomadic groups (hunter-gatherers and pastoralists).⁷⁶ The author elaborated on the conditions of applicability of indigenism to different groups within the African context.⁷⁷ He contended that the concept 'indigenous peoples' should not be construed in the sense of 'first comers' since many pastoral groups would be excluded as they were widely believed to have settled on presently occupied territories after other groups.⁷⁸ This proposition was in conformity with prevailing theories on population migrations on the African continent throughout history. Instead, he proposed a 'structural' construction of indigenism whereby the concept covers 'marginalised populations in a non-hegemonic position, in relation to the groups that are currently in power in the national state'.⁷⁹ Wæhle was still reluctant to unequivocally endorse the applicability of the concept 'indigenous peoples' to Africa as he listed 'three, possibly interconnected trends' that justified the initiation of debates thereon, namely: (1) the assertion of group rights which parallels ethnic/indigenous assertion of rights elsewhere; (2) the grave situation of human rights in many parts of Africa (also in the sense of collective or group rights); and (3) African concerns or efforts for self-development and self-determination.⁸⁰ An examination of the subsequent activism for recognition and protection of indigenous rights in Africa shows that these constitute the central ideas upon which the movement was erected.

From the early 1990s, activities undertaken by IWGIA – in conjunction with other actors – in stirring up and debating indigenous identification on the continent laid the foundations of the indigenous rights movement on the continent. In addition to an increased number of publications specifically exploring indigenism in Africa,⁸¹ IWGIA sponsored and hosted a conference on indigenous peoples in Africa in 1993.⁸² Convened in Tune, Denmark, the conference was the first major event exploring indigenism in Africa that recorded active participation of a dozen representatives from claimant indigenous groups.⁸³ The proceedings of the conference acknowledged the colonial roots of marginality of claimant indigenous communities but argued that

[t]he indigenous 'movement' in Africa has grown as a response to the policies adopted by independent post-colonial African states. The favouring of settled agriculture over hunting, gathering and nomadic cattle-herding has been instrumental in both marginalizing and stigmatizing some peoples and inspiring them to identify themselves as indigenous groups.⁸⁴

Based on a 'structuralist' approach to the definition of indigenous peoples, the publication described 'indigenous peoples of Africa' as 'populations who deliberately escaped from,

or were left out of all forms of participation in modern development'.⁸⁵ The structural conception of indigenusness raised questions as to why not all marginalised peoples could be characterised as indigenous and whether indigenusness would cease once marginality disappeared.⁸⁶ Neither the additional 'substantial definition' of nor the 'historical approach' to indigenous peoples provided sound theoretical grounds for exclusion of groups other than hunter-gatherers and transhumant livestock herders from the indigenous rights framework.⁸⁷

For instance, in spite of the tragic circumstances surrounding the suppression of Ogoni activism in the mid-1990s and the execution of their leaders, including Ken Saro-Wiwa, by the military regime of Sani Abacha, the inclusion of this community within indigenous rights activism hardly conforms to even the loosest definitions of indigeneity.⁸⁸ In the words of Ogoni activists, their traditional livelihood activities mainly consisted of subsistence farming – like the majority of African rural masses – coupled with 'migrant and nomadic fishing'.⁸⁹ Ogoni activists contended that they were politically marginalised since the British colonisation.⁹⁰ They campaigned for a fair share of revenues generated by oil exploitation on their territories, and vied for autonomous rule within an ethnicity-based Nigerian Federation.⁹¹ Clearly, beyond self-identification, the indigenous claims of the Ogoni could only be based on the so-called structuralist approach to indigenusness. The historical approach to, or the substantial definition of, indigenous peoples could hardly set the Ogoni apart from the numerous other Niger Delta or Nigerian small ethnic groups in general.⁹²

The 1993 conference opened the door for the expansion of the global indigenous movement to Africa and contributed to the progressive transformation of interrogations over the applicability of indigenusness to the continent into certainly.⁹³ Hence, some five years later, IWGIA in collaboration with the Pastoralist Indigenous NGO's (PINGO's) Forum organised the first major 'conference on indigenous peoples of Eastern, Central and Southern Africa'.⁹⁴ The stated objective of the conference was to 'contribute to the empowerment of indigenous peoples in Africa and their organizations'.⁹⁵ The insistence on the 'self' in references to indigenous organisation in, for instance, Rwanda, Tanzania and southern Africa, somewhat betrays a tendency by organisations such as IWGIA to overemphasise the grassroots character of indigenous identification on the continent by publicly downplaying their own determinant role in shaping that particular dynamic.⁹⁶ In the footsteps of IWGIA, the United Nations organised three successive conferences exploring the broader theme of 'multiculturalism in Africa: peaceful and constructive group accommodation in situations involving minorities and indigenous peoples'.⁹⁷ The reports of the Arusha, Kidal and Gaborone gatherings acknowledged the contentiousness of indigenous identification in Africa and representatives from claimant indigenous peoples and minority groups displayed a limited understanding of the differentiation between the two legal concepts.⁹⁸ These seminars nonetheless called for the recognition and protection of minority and indigenous peoples' rights.

The major achievement of the 1999 conference was the adoption of the Arusha Resolutions that not only examined the situation of claimant indigenous groups from countries of the regions under scrutiny but also recommended, among others, the creation by the ACHPR of a 'working group to consider all aspects of the rights of indigenous peoples in Africa and

to promote consideration of the matter by African states'.⁹⁹ In 2000, the ACHPR established a 'working group of experts on the rights of indigenous or *ethnic communities* in Africa'.¹⁰⁰ It was initially mandated to examine the concept of indigenous people and communities in Africa, to study the implications of the African Charter on Human Rights and well-being of indigenous communities, and to consider appropriate recommendations for the monitoring and protection of the rights of indigenous communities.¹⁰¹ The team produced a report on indigenous populations/communities that was adopted by the ACHPR in 2003 and published jointly with IWGIA in 2005.¹⁰² The importance of this particular report is not tied to the novelty of its findings as the main substantive ideas and arguments therein were drawn from existing (mainly IWGIA) publications. Instead, the institutional endorsement by an African human rights body of the case for recognition of indigenous rights constituted a major victory for indigenous rights activists and advocates. The backing of the ACHPR paved the way for an increased indigenous rights activism on the continent. Since the publication of the 2005 report, the working group has conducted several country visits to investigate the situation of claimant indigenous communities.¹⁰³

In close cooperation with IWGIA, the ACHPR working group undertook different promotional activities, and organised sensitisation seminars on indigenous peoples' rights.¹⁰⁴ Following African countries' fluctuating positions during the final process of the adoption of the United Nations Declaration on the Rights of Indigenous Peoples and the African Union's failure to uphold a common position thereon, the ACHPR adopted an advisory opinion on the subject matter.¹⁰⁵ The successful adjudication of indigenous rights by the ACHPR in *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* opened a new chapter in efforts aimed at furthering indigenous rights in Africa.¹⁰⁶ For the first time, the ACHPR clearly ruled – based on the African Charter on Human and Peoples' Rights – that the Endorois were an indigenous people whose specified collective rights were violated by the government of Kenya. Following a decade of promotional activities for recognition of indigenous rights undertaken through the ACHPR, the Endorois decision represents an important victory for indigenous rights advocates in efforts aimed at translating such rights into enforceable ones. The next battle will revolve around ensuring state compliance with this and similar rulings.

IWGIA has generally been in the background, if not the leading actor, in nearly all ACHPR activities relating to indigenous populations/communities. The composition of the working group consisted of members of the ACHPR, experts from indigenous communities in Africa and an independent expert who from the outset came from IWGIA before other African experts were added to the list.¹⁰⁷ Besides the organisation's longstanding involvement in indigenous matters throughout the world, its involvement within the framework of the ACHPR is also part of donor politics. The Danish Ministry of Foreign Affairs (through the Danish cooperation agency DANIDA) is the main financial sponsor of the indigenous rights agenda carried out on the African continent through the IWGIA–ACHPR tandem.¹⁰⁸

From a marginal footnote in literature and discourses on indigenous peoples less than two decades ago, Africa has become a central subject (even though still a marginal actor) in

shaping global indigenous rights activism over the past decade. The ILO entered the scene with projects aimed at promoting its Convention concerning Indigenous and Tribal Peoples in Independent Countries (no. 169).¹⁰⁹ The first-ever African ratification of ILO Convention 169 by the Central African Republic in 2010,¹¹⁰ and the adoption by the Republic of Congo of a law on indigenous peoples' rights¹¹¹ are signs of the progressively loosening of state barriers to recognition and protection of indigenous rights in specific African countries.

CONCLUSION: ACHIEVEMENTS AND SUBSTANTIVE DEFICIT OF THE INDIGENOUS RIGHTS MOVEMENT IN AFRICA

The process of inclusion of Africa into the global indigenous movement has made tremendous progress over the past two decades. Identification of African hunter-gatherers, pastoralists and other communities not necessarily falling under this categorisation as constitutive of the indigenous peoples is currently part of the human (indigenous) rights creed. Narratives over indigenous rights in Africa can be summed up as follows: hunter-gatherer and pastoralist communities have (historically) suffered multiple forms of 'dispossession, alienation and marginalisation'.¹¹² They are particularly vulnerable as they currently face an increasingly shrinking resource base that historically sustained their livelihoods. They suffer discrimination based on their differing socio-cultural attributes and practices regarded as backward. They are thus indigenous, not necessarily based on first occupancy of ancestral lands and territories – which, as some historical and anthropological studies argue¹¹³ may be true for hunter-gatherers but not pastoralists – but rather based on their situational characteristics. They are also indigenous because they self-identify as such – an important element under the existing, yet loose, criteria for identification of indigenous peoples. To counter arguments presenting the indigenous movement in Africa as an import from overseas that hardly takes into consideration contextual realities, indigenous activists and advocates emphasise the grassroots character of indigenous identification on the continent and the active involvement for the past decade of the ACHPR in the process.

Not surprisingly, critics of the contemporary indigenous movement in Africa denounce the 'surprising elasticity of autochthony discourses, allowing for constant shifts and redefinitions, but also making this discourse a somewhat empty one'.¹¹⁴ It is even argued that 'notions such as autochthony or indigenous appear to defend a return to the local, but in practice are more about access to the global'.¹¹⁵ Claims of historical marginality, dispossession and discrimination of current and former hunter-gatherer communities in most African countries where they live are generally undisputed. The history of Pygmy-Batwa communities in central Africa, San-Bushmen in southern Africa and East African foragers clearly shows that they have been dominated and discriminated against by neighbouring communities for several centuries. Under the pre-colonial, colonial or postcolonial systems, they have been treated as sub-humans, anthropological attractions or second-class citizens. Comparatively, marginality of pastoralist communities that currently dominate the indigenous rights movement in Africa

is mostly rooted in their marginalisation under the colonial era. It suffices to interrogate the colonial library to notice that, until the early decades of the twentieth century, there were very limited differences in lifestyles and folkloric appearance between pastoral societies such as the Maasai, Samburu, Hima or Tutsi. The colonial experiences shaped the relative marginality of some pastoral groups more than others. Undisputedly, transhumant pastoralism in Africa currently faces real challenges of sustainability due to the progressive shrinking of the vast pastures that this particular lifestyle requires. It is also widely documented that, with no viable alternatives, members of pastoral communities who have not adopted other lifestyles live in precarious conditions.¹¹⁶ This reinforces the marginalisation and discrimination of members of pastoral communities, yet the relative marginality of pastoral communities does not match the systematic subjugation of hunter-gatherer communities by neighbouring, including pastoral communities throughout history. Furthermore, experiences of subjugation, marginalisation, dispossession, exclusion or discrimination of pastoral communities are real but they can only be construed relatively, on an African continent harbouring more than a thousand different ethno-cultural communities.¹¹⁷

The growing literature on indigeneness in Africa has so far failed to produce credible – historical, economic and socio-political – indicators that would contrast marginality of pastoral communities with the situation of smaller, mainly rural agricultural communities in multi-ethnic countries. The dominant tendency to dogmatically rehearse popularised ideas over the plight of claimant pastoralist and hunter-gatherer communities still suffers from a lack of clarity as to the sources and distinctive attributes of indigeneness on the continent. Beyond self-identification, the looseness and, in some cases, relativeness of identification criteria for indigeneness as applied to Africa undermines a clear comprehension of the substantive dimensions of indigeneness on the continent. Since priority in time on specific lands or territories no longer features among the required criteria of identification of indigenous people in the African context,¹¹⁸ the remaining criteria are somewhat either relative or subjective. Controversies surrounding the invocation of indigenous rights by Rehoboth Basters and Afrikaner nationalists are eloquent illustrations.¹¹⁹ Clearly, the history of state formation in Africa with its multiple examples of collective marginality and oppression suggests that more communities than those often listed may fulfil the existing loose criteria for identification of indigenous peoples. Even the Endorois decision does not clarify the existing ambiguities over what it takes to be included or excluded from the indigenous peoples' legal category. In predominantly multi-ethnic African countries, future studies, decisions or rulings still have to produce more sound criteria and indicators for the determination of contemporary indigeneness.

NOTES AND REFERENCES

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- 2 See, for instance, the University of Pretoria's Indigenous Peoples' Rights database. Available at: http://chr.up.ac.za/chr_old/indigenous [Accessed 12 October 2011]; Ndahinda, F.M., 2011. *Indigeness in Africa: A contested legal framework for empowerment of 'marginalised' communities*. Hague/Berlin/Heidelberg: T.M.C. Asser Press/Springer, pp.362–368.
- 3 Daes, E.-I., 1996. Working paper by the chairperson-rapporteur on the concept of 'indigenous people', UN Doc. E/CN.4/Sub.2/AC.4/1996/2, 10 June, para. 69.
- 4 Ibid. See also Anaya, J., 2004. *Indigenous peoples in international law*, 2nd ed. New York: Oxford University Press; Niezen, R., 2003. *The origin of indigenism: Human rights and the politics of identity*. Berkeley: University of California Press.
- 5 Borrowed from Jackson, S., 2006. Sons of which soil? The language and politics of autochthony in eastern D.R. Congo. *African Studies Review*, 49(2), September, pp.95–123.
- 6 For more on these developments, see Minde, H., Eide, A. & Åhrén, M., (eds), 2007. The UN Declaration on the Rights of Indigenous Peoples: What made it possible? The work and process beyond the final adoption, Gáldu ála. *Journal of Indigenous Peoples Rights*, 4, pp.9–139; Anaya, 2004.
- 7 For an overview of different definitions of 'indigenous', see Corntassel, J., 2003. Who is indigenous? 'Peoplehood' and ethnonationalist approaches to rearticulating indigenous identity, *Nationalism Ethnic Politics*, 9(1), pp.75–100; Wiessner, S., 1999. Rights and status of indigenous peoples: A global comparative and international legal analysis. *Harvard Human Rights Journal*, 12, pp.57–128.
- 8 Daes, E.-I., 1996. Working paper by the chairperson-rapporteur on the concept of 'indigenous people'. UN Doc. E/CN.4/Sub.2/AC.4/1996/2, 10 June 1996, para. 10.
- 9 See Latimer, E.W., 1898. *Europe in Africa in the nineteenth century*. Chicago: A.C. McClurg.
- 10 For instance in French Africa, *les indènes* (the indigenous) were subjected to separate legal regimes.
- 11 For elaborations thereon, see Ndahinda, 2011, pp.18–33 & 56–62.
- 12 See, for instance, Dowd, J., 1907. *The negro races: A sociological study*. New York: Macmillan; Johnston, H.H. et al., 1913. A survey of the ethnography of Africa and the former racial and tribal migrations in that continent. *Journal of the Royal Anthropological Institute of Great Britain and Ireland*, 43, July/December, pp.383 & 407; Hubbard, G.G., 1889. Africa, its past and future. *Science*, 13(311), January, pp.42–50.
- 13 For some early classifications see Latham, R., 1850. *The natural history of the varieties of man*. London: John Van Voorst, pp.469–506; De Préville, A., 1894. *Les sociétés africaines, leur origine, leur évolution, leur avenir*. Paris: Firmin-Didot. These studies were questionable because – contrary to the currently held view that Africa is the cradle of mankind – they were premised on a shared belief at the time that 'Southern Asia was the region in which man originated, and in which he began to differentiate into three principle sub-species – Caucasian, Negro, and Mongol' as stated in Johnston, H.H., 1907. The origin of the Bantu. *Journal of the African Society*, VI (XXIV), July, p.333. See also Mitchell, P. & Whitelaw, G., 2005. The archaeology of southernmost Africa from c. 2000 BP to the early 1800s: A review of recent research. *Journal of African History*, 46(2), pp.209–241 for an overview of more recent archaeological data and theories.
- 14 Haddon, A.C., 1910. *The races of man and their distribution*. New York: Frederick A. Stokes, pp.33–39; Johnston, H.H., 1905. *A history of the colonization of Africa by alien races*. Cambridge: Cambridge University Press, p.1 et seq.; Johnston, 1907, pp.329–340. Brinton, D.G., 1901. *Races and peoples: Lectures on the science of ethnography*, Philadelphia: David McKay, pp.103–172 & 173–193, classifying the African populations into Euraficans (Semitic and Hamitic races), Negrillos, Negroes and Negroids.
- 15 Murdock, G.P., 1959. *Africa, its people and their culture history*, New York: McGraw Hill, pp.7–12.
- 16 Chatelain, H., 1894. African races. *Journal of American Folklore*, 7(27), October – December, pp.289–302; Johnston, H., 1910. *Britain across the seas: Africa history and description of the British Empire in Africa*. London: National Society's Depository, pp.14–44.

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- 19 Murdock, 1959, pp.44–17; Johnston, H.H., 1917. The Bantu and the semi-Bantu languages, *Journal of the Royal African Society*, 16(62), January, pp.97–110; Hiernaux, J., 1968. Bantu expansion: The evidence from physical anthropology confronted with linguistic and archaeological evidence. *Journal of African History*, 9(4), pp.505–515; Oliver, R., 1966. Bantu genesis: An inquiry into some problems of early Bantu history. *African Affairs*, 65(260), July, pp.245–258.
- 20 Murdock, 1959, pp.44–17; Giuseppe, S., 1909. *The Mediterranean race: A study of the origin of European peoples*, London: Walter Scott, pp.40–43; Sanders, E.R., 1969. The Hamitic hypothesis; its origin and functions in time perspective. *Journal of African History*, X(4), pp.521–532.
- 21 Delafosse, M., 1941. *Les noirs de l'Afrique*, Paris: Payot, p.11 et seq.
- 22 Lugard, F.D., 1922. *The dual mandate in British tropical Africa*. Edinburgh/London: William Blackwood & Sons, p.68, wrote: 'The finer negro races, among whom are included the group of tribes known as the Bantus, have no doubt in prehistoric times assimilated alien blood, which has differentiated them from the aboriginal negro type. They may, however, be said to constitute the general Negro race-type of to-day'.
- 23 According to Lugard, 1922, p.67: The immigrant races, generally called Hamites, are supposed to have invaded North-East Africa 'probably a good deal more than 4000 or 5000 BC'. There was a Semitic invasion some 2 000 years later, but its elements have entirely disappeared, though it has left indelible traces on the language and racial characteristics of Abyssinia.
- 24 Oliver, R., 1982. The Nilotic contribution to Bantu Africa. *Journal of African History*, 23(4), pp.433–442.
- 25 See : Loi sur le gouvernement du Congo Belge, 18 Octobre 1908. *Recueil usuel*, VI, pp.565–572; Roux, E., 1911. *Manuel à l'usage des administrateurs et du personnel des affaires indigènes de la colonie du Sénégal et des colonies relevant du gouvernement général de l'Afrique occidentale française*. Paris: Augustin Challamel.
- 26 For instance, there are several references to indigenous (populations, chiefs, ethnicities, administration, customs, tribunals) in *Gouvernement général de l'Afrique occidentale française. Circulaires [de M. le gouverneur général Jules Brévié] sur la politique et l'administration indigènes en Afrique occidentale française*. Gorée, Imprimerie du Gouvernement Général, 1935, pp.5–71.
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- 35 Ibid. See also Manuel, G. & Posluns, M., 1974. *The Fourth World: An Indian reality*. New York: The Free Press, p.5.
- 36 Minde, H., 2007. The destination and the journey: Indigenous peoples and the United Nations from the 1960s through 1985, in Minde, H., Eide, A. & Åhrén, M., (eds). The UN Declaration on the Rights of Indigenous Peoples: What made it possible? The work and process beyond the final adoption. *Gáldu ála – Journal of Indigenous Peoples Rights*, 4, pp.17–18.
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- 52 Dahl, 2009, pp.65–68.
- 53 Ibid., p.65.
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- 55 Dahl, 2009, p.66. He specifically refers to the Efe-Mbuti/Pygmies of the Ituri rainforest and the Maasai, Barabaig and Samburu pastoralists.
- 56 IWGIA, *Indigenous Affairs*, 3, 1998, p.4; see also Ndahinda, 2011, p.61.
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- 62 Ibid., pp.62–68.
- 63 IWGIA, 1989. *Yearbook 1988: IWGIA 20 years*. Copenhagen: IWGIA Publications, p.132. Groups specifically mentioned were Sahrawi (Western Sahara); Nomads (Mauritania); Shilluk, Nuer, Dinka, Mandara (Sudan); Oromo, Anuak, Eritrea and Tigray (Ethiopia); Issaq (Somalia); Maasai (Kenya-Tanzania); Barabaig (Tanzania); Mbuti-Pygmy (R. Congo-D.R. Congo/Zaire); Hutu and Tutsi (Burundi-Rwanda); and San (Basarwa, Ju/Wasi, Bushmen – Botswana-Namibia). The same appears in IWGIA, *Yearbook 1990*, Copenhagen: IWGIA Publications, 1991, p.144.
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Hedareb and Nara (Denara).) To these traditional groups are added the Jiberti Muslims (whose claim as the tenth group remains officially unrecognised); the Tekurir (a small group of recently settled migrants said to be descendants of the Hausa tribe of Nigeria) and a number of foreign groups established in the country for more or less a long time (see Mebrahtu, S., 2009. *Country report of the research project by the International Labour Organization and the African Commission on Human and Peoples' Rights on the constitutional and legislative protection of the rights of indigenous peoples: Eritrea*, p.3. Available at http://www.chr.up.ac.za/chr_old/indigenous/country_reports/Country_reports_Eritrea.pdf [Accessed 2 November 2011].

69 Mebrahtu, 2009, p.4.

70 Ibid.

71 Ibid., pp.4–5.

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73 Early IWGIA reports (*Yearbook 1986*, p.64; *Yearbook 1988*, p.132; *Yearbook 1990*, p.144) mentioned 'Eritrea and Tigray' most likely in reference to the two documented movements at the time fighting the Ethiopian government (cfr: Tesfagiorgis, 1987, pp.75–128; McCracken, M.J., 2004. Abusing self-determination and democracy: How the TPLF is looting Ethiopia. *Case Western Reserve Journal of International Law*, 36(1), Winter, pp.183–222.

74 IWGIA *Yearbook 1988*, p.132; IWGIA *Yearbook 1990*, p.144.

75 IWGIA *Yearbook 1990*, pp.145–148.

76 Ibid, p.145.

77 Ibid.

78 Ibid. He particularly named the Maasai, believed to be later comers in East Africa in comparison with Bantu-speaking agriculturalists.

79 Ibid.

80 Ibid, p.147.

81 Relevant publications in the early to mid-1990s include: IWGIA, *Newsletter no. 3*, pp.3–17 (Horn of Africa); IWGIA, *Newsletter no. 2*, April/May/June 1993 (specifically dedicated to Africa); Murumbi, D., 1994. The concept of indigenous peoples in Africa. *Indigenous Affairs*, 1, January/February, March, pp.51–57; Simonsen, A.H., 1995. Where oil kills: The Ogoni tragedy, IWGIA *Newsletter*, October/November/December, pp.52–54; Lewis, J. & Knight, J., 1995. *Assessment of the situation of the Twa and promotion of Twa rights in post-war Rwanda*. Copenhagen: World Rainforest Movement/IWGIA Publications; Hitchcock, R., 1996. *Kalahari communities: Bushmen and the politics of the environment in southern Africa*. Copenhagen: IWGIA Publications; Nwiado, D., 1996. Militarizing commerce in Africa: The example of Shell in Ogoniland. *Indigenous Affairs*, 2, pp.2–56.

82 See Weber, H. et al. (eds), 1993. '*... Never drink from the same cup*'. Proceedings of the Conference on Indigenous Peoples in Africa. Copenhagen: IWGIA Publications/Centre for Development Research, 1993.

83 Ibid., pp.325–326. Besides a number of anthropologists and human rights lawyers mainly from the West, but also Africa and state representatives, participants included representatives from the Tuareg (Mali), the San-Bushmen (Botswana and Namibia), Maasai (Tanzania), and Twa (Rwanda).

84 Weber, H. & Wæhle, E., 1993. '*... Never drink from the same cup*', in Weber et al. 1993, p.10. The last quoted sentence is reproduced verbatim (together with the following section) in the ACHPR & IWGIA *Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities*. Copenhagen: IWGIA Publications, 2005 (ACHPR and IWGIA report 2005), p.92.

85 Weber, H. & Wæhle, E., 1993. '*... Never drink from the same cup*', in Weber et al., p.11. See also Berge, G., 1993. Reflection on the concept of indigenous peoples in Africa: The case of the Tuareg, in Weber et al., pp.235–246.

- 86 Weber, H. & Wæhle, E., 1993, p.12.
- 87 Ibid., pp.12–13. Under the former, the tendency to consider culture as static was criticised while the latter approach was questioned as likely to lead to the exclusion from the indigenous movement of groups that could not prove their priority in time on currently occupied territories. It was argued that asserting aboriginality in Africa was questionable since 'people have moved around throughout history for many reasons, both voluntary and enforced'.
- 88 For some analysis on Ogoni militancy and the tragic execution of Ogoni leaders in the mid-1990s, see Osaghae, E.E., 1995. The Ogoni uprising: Oil politics, minority agitation and the future of the Nigerian state. *African Affairs*, 94(376), July, pp.325–344; Welch C.E. (Jr), 1995. The Ogoni and self-determination: Increasing violence in Nigeria, *Journal of Modern African Studies*, 33(4), December, pp.635–650; Ndahinda, 2011, pp.81–82; Simonsen, 1995, pp.52–54; IWGIA, 1995, Letter from Ken Saro-Wiwa to IWGIA representative Anne, *IWGIA Newsletter*, October, November/December, p.55.
- 89 Movement for the Survival of Ogoni People (MOSOP), *Ogoni Bill of Rights: Statement by Dr G.B. Leton, Oon JP, President of the MISOP*, para. 2. Available at http://www.mosop.org/Ogoni_Bill_of_Rights_1990.pdf [Accessed 7 November 2011].
- 90 *Ogoni Bill of Rights*, para 1. They contend that 'the Ogoni people, before the advent of British colonialism, were not conquered or colonized by any other ethnic group in present-day Nigeria'.
- 91 Ibid., paras 7–20. See also Welch C.E. 1995, p.640; Osaghae, 1995, pp.325–344.
- 92 On the issue of marginalisation from state power, Osaghae, 1995, p.331, argued that 'the Ogonis have fared better than most other minorities (including oil-producing minorities) in appointments to top government positions which is usually the yardstick for measuring access to state power'.
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- 96 On 'indigenous self-organisation' in Rwanda, Tanzania and southern Africa, see *Indigenous Affairs*, 2, pp.16–21 & 34–37.
- 97 ECOSOC, Report[s] on the Seminar[s] on 'Multiculturalism in Africa: Peaceful and constructive group accommodation in situations involving minorities and indigenous peoples', Arusha, Tanzania, UN Doc. E/CN.4/Sub.2/AC.5/2000/WP.3, 20 May 2000; Kidal, Mali, UN Doc. E/CN.4/Sub.2/AC.5/2001/3, 2 April 2001; and Gaborone, Botswana, UN Doc. E/CN.4/Sub.2/AC.4/2002/4, 17 June 2002.
- 98 For instance in UN Doc. E/CN.4/Sub.2/AC.5/2000/WP.3, para 30, it was noted that '[p]articipants recognized that one of the legacies of colonialism was to divide *indigenous peoples* so that certain groups were living in more than one country, making them a *minority*' [emphasis added]. Naturally, this is true not only for groups enrolled in the contemporary indigenous rights movement such as the Maasai (Kenya-Tanzania) but also of non-claimant groups such as the Bakongo (Democratic Republic of the Congo, Republic of Congo and Angola).
- 99 IWGIA, 1999. Arusha resolutions, *Indigenous Affairs*, 2, April/May/June, pp.50–55, para 21.3.
- 100 ACHPR, 2000. *Resolution on the Rights of Indigenous Populations/Communities in Africa*. 28th Ord. Sess., Cotonou/Benin, 23 October to 6 November 2000, 14th Annual Activity Report, ACHPR/Res. 51(XXVIII)00 [emphasis added]. It was renamed the 'Working Group of Experts on the Rights of Indigenous Populations/Communities in Africa' and eventually became known as the 'Working Group on Indigenous Populations/Communities' (hereafter the ACHPR Working Group or simply the Working Group).

101 Ibid., para. 3.

102 ACHPR, 2003. *Resolution on the Adoption of the 'Report of the African Commission's Working Group on Indigenous Populations/Communities'*, 34th Ord. Sess., Banjul/The Gambia, 6–20 November 2003, 17th Annual Activity Report, ACHPR/Res. 65(XXXIV)03, p.53.

103 On country visits to Niger, Namibia, Botswana, Republic of Congo, Burundi, Uganda, Central African Republic, Libya, Gabon, Rwanda, Democratic Republic of the Congo, see <http://www.iwgia.org/publications/publications-by-region/-/africa-> [Accessed 9 November 2011].

104 Ibid.

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3

The Impact of Dominant Environment Policies on Indigenous Peoples in Africa

Melakou Tegegn¹

INTRODUCTION

The issue of the rights of indigenous peoples is closely related to environmental conservation because indigenous peoples' livelihoods largely depend on the conservation of their habitat. That is indeed why the discourse on alternative paradigms of development that places the environmental movement at the disjuncture of corporate globalisation should inevitably deal with the plight of indigenous peoples as well. This understanding constitutes one more compelling reason why macro-economic planning, and planning for social change, cannot evade the inclusion of addressing the plight of indigenous communities.

ENVIRONMENTAL CHALLENGES THAT AFRICA'S INDIGENOUS PEOPLES FACE

Nature and the environment are crucial to Africans. This is because the overwhelming majority of them live in rural areas and are engaged in traditional ways of life that depend on natural resources. Farmers work the land to raise crops; pastoralists raise livestock, and hunter-gatherers travel widely to find their sustenance. In all, this relationship with nature and the environment is a defining characteristic of African life, and its vital expression can be found in the collection of wood for fire, materials to construct shelter, plants for medicine, and so on. It is therefore essential that Africans understand and relate to nature and the environment. Because, as indicated elsewhere:

The state of nature, such as the climate, determines the availability of natural resources upon which rural people depend for their livelihood. The state of the climate determines the availability of rain, which in turn determines availability of water.²

In effect, nature and the environment support and sustain life, and serve as the physical domain for traditional livelihood systems. For all rural peoples, including the indigenous, upsetting or abusing the balance of the relationship with nature and the environment would inevitably lead to disastrous life-altering consequences. For this reason it is critically important that the conservation of nature and the preservation of the environment occupy a central place in indigenous peoples' knowledge systems.

Although indigenous peoples are guardians of the environment due to their close relationship with it, they still face serious environmental challenges that can turn out to be debilitating to their very existence as communities. In *The state of the world's indigenous peoples*, the United Nations (UN) notes:

The environmental challenges faced by indigenous peoples today are manifold. The dispossession of lands and natural resources and the impact of large-scale development projects are issues that indigenous peoples have confronted for decades, if not for centuries. In addition, there is a range of new challenges that have to do with science-based technology and development in general, such as genetic resources, bio-piracy and intellectual property rights, as well as the environmental problems faced by the increasing number of indigenous peoples living in urban areas.⁵

Climate change as a result of the increasing process of global warming poses perhaps the direst environmental challenge to indigenous communities worldwide. The effect of climate change is reflected in increasingly erratic and uncertain weather, resulting in extreme conditions involving heavy rains that cause massive flooding or incessant droughts that damage crops and decimate livestock. Indigenous pastoral communities who live in arid and semi-arid areas regularly face the extreme weather conditions caused by drought and flooding too. In either case, pastoral livelihoods are adversely affected as properties are damaged and livestock perish. In the 1992 drought in Ethiopia, the Borana pastoral community lost close to 90 per cent of its livestock. The outcome was indeed dire and the Borana were left without enough breeding livestock to restock their herds. Incessant drought patterns in Kenya in recent years have also seen pastoralists losing animals in their thousands. In the 1973 Sahel drought, millions of livestock and people fell victim and died. In particular regions of the continent such as the Horn of Africa which encompasses eight countries, droughts and floods have become very frequent events and the consequences have brought similar devastation to human and animal lives.

A central and worrying issue that is often glossed over in attempts to combat climate change is the fact that whereas indigenous peoples have little or no part in the emission of greenhouse gases that contribute to climate change, they nonetheless bear the disproportionate and debilitating impact of the resultant floods, droughts and related extreme weather conditions. Most disconcerting in mitigation measures is that while indigenous peoples' traditional knowledge and practice can play a crucial role in combating climate change and in protecting the environment, very little, if anything has been done to incorporate them into current approaches. This is as disconcerting as it is lamentable since indigenous peoples,

including pastoral communities, possess longstanding and excellent traditions of protecting the environment in their indigenous knowledge system. A large part of the problem, and probably the most significant, is the fact that indigenous knowledge systems are considered 'unscientific' and not in keeping with 'modern' constructs of development. This unfair and discriminatory labelling is a colonial hangover supported by development thinking that has come to define post-colonial development strategies and agendas.

In recent decades, there have been numerous attempts to advance the central position that indigenous communities deserve recognition in the processes of climate change mitigation and environmental protection at international level. The International Labour Organisation (ILO) Convention 107 and its successor, ILO Convention 169, were early attempts at international regulation of indigenous rights, including those in climate change mitigation processes. The major breakthrough in the recognition of the right and role of indigenous peoples came at the UN Conference on Environment and Development (UNCED), known as the Earth Summit, in Rio in 1992. UNCED adopted important treaties on the environment such as the Convention on Biological Diversity and the UN Framework Convention on Climate Change. UNCED also came up with non-binding documents such as the Declaration on Environment and Development (known as the Rio Declaration), Agenda 21 and Forest Principles. Most of these documents seek to remedy indigenous peoples' concerns.⁴ The principles involved in these documents were further elaborated upon and reiterated at the World Summit on Sustainable Development (WSSD) in Johannesburg in 2002, which adopted the Kimberley Political Declaration, which was the resolution of the Indigenous People's International Summit on Sustainable Development held in the South African city of Kimberley ahead of the WSSD.

These developments at international level have unfortunately not received similar appreciation in national contexts in the African continent. Instead, many African states ironically and persistently view indigenous communities as a threat to the environment. Such has been the treatment of the Kenyan government in relation to various forest communities such as the Ogiek and Sengwer,⁵ not to mention Botswana's dealing with the Basarwa, and, as this marginalisation of indigenous peoples persists at national level, the relevance and wisdom of indigenous practice in the area of climate change continue to be ignored, resulting in dire continental consequences.

INDIGENOUS PEOPLES AS ENVIRONMENTAL REFUGEES OF GLOBALISATION, NEO-LIBERALISM AND CONSUMERISM

Environmental degradation is taking place mainly as a result of modernisation projects such as the introduction of large-scale commercial farms, wildlife sanctuaries, national parks, game reserves and mining on indigenous peoples' lands. The dominant forces that advance the 'modernisation project as development' are the World Bank, the International Monetary Fund (IMF) and dominant Western governments like the United States, France and Great Britain. There is also a host of non-governmental organisations (NGOs), private

developers and other interested civil society organisations that advance the interests of so-called modernisation and development. Upon independence, African states entered into development relationships with former colonial masters and other donor states and organisations that fomented disastrous, if even unconsidered, consequences for indigenous peoples. Consequently, and more often than not, the resultant projects of modernity have not benefited the indigenous communities. Rather, the track record since independence provides clear evidence that indigenous peoples have been defrauded and marginalised through forced displacement that has not brought compensation or created favourable conditions for social development and consequential upliftment.

However, the foregoing assertions are too general and unspecific to answer or grapple with the main concerns of this chapter. We have to focus our discussion more intently on the neo-liberal discourse of mainstream development thinking and practice, of which most governments, including the vast majority of those on the African continent, are adherents. As a result, their thinking and practice is informed by neo-liberal assumptions of social development and economic growth.

To fully understand the impact of this emphasis and its consequences, the ideological nature of the neo-liberal paradigm must be appropriately and thoroughly dissected. For our immediate purposes, this means that we have to ask what the ideological construct is that informs the orientation of governments in Africa towards development. Where did it come from? What do we as Africans understand by development and how is it implemented? Such questions need to be answered if we are to get a fuller or more comprehensive picture of where indigenous peoples are situated in the development paradigm that informs post-independence African states.

At the outset, we must recognise that neo-liberal policies of development and economic growth are basically market driven, and are advanced in statist or state-driven and state-dominated models of governance. This is, for example, the case in Ethiopia where the current consensus is toward the other driving consensus of neo-liberal policies, and that is privileging and supporting private ownership of the means of production. In a global sense we did not arrive at this juncture without the neo-liberal model passing through various stages and expanding from its materialist origins during the Industrial Revolution. Over subsequent centuries, the now dominant neo-liberal discourse has traversed through turbulence generated by labour/revolutionary movements on the one hand and the expansion of the state 'socialist' model on the other, particularly after World War I. The Cold War period saw more turbulent decades as the two warring camps – the capitalist West and socialist East – fought for spheres of global influence. The dominant discourse is consequently advanced by powerful forces that dominate the world, and is therefore the main ideological instrument of these powers.

In other words, from the simple factory system of the immediate Industrial Revolution period, it passed through stages such as the concentration of capital and the formation of a financial oligarchy, to colonisation for the purpose of extraction of raw materials from the colonies to its own industries in the North, to neo-colonisation in the colonies' period of post-independence and finally to its current form, which is the globalisation of the market. In

Africa, the dominant discourse made headway during colonisation, which was largely made possible by the introduction of Christianity.⁶

In Africa, the ideas of modernisation and the modern state were introduced simultaneously following the introduction of Christianity. The colonial state introduced in Africa was not really a true modern state in the strict sense since its *raison d'être* and historical mission were completely different from the 'mother state' in Europe. In fact, corresponding to its *raison d'être*, which was to facilitate the extraction of raw materials from Africa, the colonial state was skeletal in terms of institutional dispensation and can be said to have been a crude variant of the modern state. It is precisely for this reason that freedom and democracy, and by extension, civil society, were not its derivative. On the contrary, the whole experience of the colonial state as a modern state can be characterised as fundamentally repressive and, as in the case of the Belgians in the Congo, consequently genocidal too. In the post-independence period, the African state stepped into the shoes of the colonial state, and opted to run it in the way its predecessor did – that is, devoid of freedom and democracy.

If by stepping into the shoes of the colonial state the post-colonial state in Africa boarded the wrong train or, in the words of Rene Dumont, made a 'false start', then what alternative political, economic, social and ideological course should have informed the policies of social development? In the first place, it would be the height of absurdity to come up with a blueprint for development of the continent as a whole. In fact, it is a colonial and racist construct to put Africa in one basket when it comes to formulating policies and remedies for socio-economic ills. Africa is vast, diverse and heterogeneous in terms of history, ethnicity, cultures and languages. It would be wrongheaded to come up with an overarching development blueprint for the entire continent: this is fundamental to understanding African development.

However, this is not to discount the similarities across the various regions and sub-regions of the continent, such as the communities in the Horn of Africa, the Sahel, southern Africa, and so on. Some of these similarities hinge on the almost total dependence of the entire people of the continent on nature and the environment, as discussed above. It cannot be ignored that indigenous peoples across the continent have similar developmental needs, be they from farming, pastoral or hunter-gatherer communities. The same can be said of women and girls who occupy a degraded position in African society. Consequently, any notion of an alternative African-centred construct on social development or social change must take these fundamental and characteristic features as its point of departure. The end of the colonial era prompted the expectation that an alternative strategy for change and development would inform the nature of post-colonial governance. This expectation has largely not been met, but how should development been constructed from day one?

In a political sense, the state and society relationship or governance contract should have been the negation of the colonial state, but it was not. The very fact that colonisation dehumanised individual Africans may have been recognised but it was not negated by the assumption of power that came with the new political elite. This thwarted the expectation that the post-colonial political dispensation would lift Africans above the devastation of colonialism. Consequently, independence did not institutionalise freedom to serve the

emergence of a civil society that would guarantee a proper and transparent relationship between the aspirations of state and society. This social contract, now largely absent, is necessary to bind state and society in the common purpose of holistic development.

Policies on social development need to start with what Africa has in terms of existing and actual wealth. We live in a globalised and interdependent world, and as such no African country can exist without entering into trade and relationships with the outside world. However, the starting point for social development must be to create a better life for the populace on a sustainable basis. The 'better life' crucible should not be defined according to an economic model from anywhere else but on the basis of what prevails in an African society. The reality in Africa is that the majority of the population lives in rural areas and is dependent on what nature and the environment provide. A 'better life' in this respect includes ensuring the sustainability of existing livelihoods; the introduction of measures to help communities diversify their means of livelihood; providing basic healthcare; providing tertiary and civic education; ending violence and discrimination against women; ending ethnic and other forms of bigotry; mapping a proper balance between the rural and modern sectors of the economy while implementing a realistic and gradual policy to phase out the dependence of the rural population on nature; and adopting a foreign policy on the basis of neutrality and active solidarity with oppressed peoples.

However, the post-colonial elite that dominated political power at independence followed a different path. They not only followed the path mapped by the colonial state – the very purpose of which was facilitating the extraction of raw materials, as mentioned earlier – but also ventured on a wealth-amassing project for the elite that necessitated making impunity a norm, a crime which requires the instalment of a fiercely brutal military or bureaucratic dictatorship. Post-colonial development was defined as modernity and very much restricted to economic planning and output. Anything traditional was labelled as 'backward' and anything 'modern' was imported from the developed north, and the 'mother' countries became the standard bearer of modernity. This is how indigenous peoples consequently became categorised as 'backward' and even 'uncivilised'.⁷ Society as a whole and the educated elite are indoctrinated by this dominant discourse. The ideological apparatuses such as educational institutions, the media and religious institutions play a crucial role in moulding society in this respect. Schools, whose curricula have hardly been decolonised, indoctrinate the young, and the social sciences in higher-learning institutions cultivate the elite with the main tenets of the dominant discourse.

The African elite, whose intellectual formation was cultivated by the colonial state and later by the neo-colonial school, dreamt about industrialisation on African soil. According to the African elite, nature and natural resources should be sacrificed to bring in industrialisation. It follows from here that traditional livelihood systems such as pastoralism, hunting and gathering were all to be dispensed with for the sake of a modern economy.

Nearly 60 years after independence, industrialisation in Africa remains 'pie in the sky', so to speak. Most Africans remain dependent on what nature provides even while the African ruling elite are glued to a neo-liberal development paradigm that is failing not only in the

African context but also globally, as the latest crisis of capitalism starkly displays. A counter-discourse must start off by deconstructing the fundamental premises of the dominant discourse. The point of departure for this discourse is the dilemma that the planet finds itself in as a result of the destruction of the environment by neo-liberal development planning. This dilemma has its roots in successive economic crises that began with the Great Depression in the 1930s and continues with ferocity to this day in the north and the south, though the latter can be seen to have fared much worse.

Consequently, with the exception of a handful of countries that have become successful, the entire south has been thrown into colossal poverty. The collapse of the dominant discourse indicates that it is now necessary to search not only for an alternative development paradigm but also for the necessity to recognise traditional and indigenous knowledge systems as viable systems that have sustained the livelihoods of millions of people over successive generations.

It is in light of the need for the recognition of indigenous knowledge systems that the essence of development for indigenous peoples needs to be redefined. To start with, the essence of development should be to improve the lives of ordinary people and not only a handful of elites. Where it pertains to indigenous peoples, development should be reflective and articulated by indigenous peoples themselves. It should not be up to others like the ruling elite, let alone those who do not even understand indigenous livelihood systems, to define what improvements should be implemented. This is a fundamental and crucial first step toward indigenising development and moving indigenous peoples from the margins of development thinking and practice.

RE-EXAMINING THE LAND AND ENVIRONMENT NEXUS AND ITS SIGNIFICANCE TO INDIGENOUS PEOPLES

Land and environment occupy a central place in the lives of indigenous peoples. One of the most significant features that distinguishes indigenous communities is their relationship and attachment to their land, often referred to as ancestral land. Andrew Gray correctly argues that '[i]ndigenous peoples have always identified themselves by the importance of the bond with their lands and their distinct cultures'.⁸ Additionally, the UNHCHR's Leaflet No. 10 states:

Indigenous peoples share a spiritual, cultural, social and economic relationship with their traditional lands, and their customary laws, customs and practices reflect both an attachment to land and a responsibility for preserving traditional lands for use by future generations.⁹

In indigenous knowledge systems, land, environment and nature are embodied into one whole as natural resources. Indigenous peoples are largely engaged in limited livelihood systems for survival such as cattle/animal husbandry in the case of pastoralists, hunting and gathering in the case of forest people, and fishing as found in Kenya among the Elmololo who live alongside

Lake Turkana. These livelihood systems fall entirely under the category of natural/traditional economy. Production is for consumption by the community, and very little is provided for exchange to barter or buy other essential items for survival.

In production systems under indigenous livelihood, dependence on nature in terms of water availability, pasture, forest and other natural resources characterises not only the production system but also the character of the livelihood. Indigenous livelihood systems are in harmony with nature and the biosphere. In fact, because indigenous livelihood is nature dependent, such systems protect and preserve land and the environment. It is precisely for this reason that pastoral communities have a rich culture of environmental protection that constitutes the cornerstone of their indigenous knowledge system. Their livelihood and culture is highly dependent on the protection of their land and environment.¹⁰

For indigenous people, land and the environment support and sustain life. Land and environment constitute the physical domain of indigenous livelihood systems; they are the base for production, gathering and fishing. There is nothing more sacrilegious to indigenous communities than threats to their land and environment. As such, in indigenous knowledge systems, land and the environment assume social, economic, spiritual and political dimensions.¹¹ A major emphasis underlining the indigenous knowledge system is the fact that land is collectively owned. In this sense, we can say that in the indigenous knowledge system a 'culture-spiritual value-collective ownership nexus' therefore exists. In this traditional collective ownership, profit and the market are not rationales for livelihoods. It is in recognition of the 'culture-spiritual value-collective ownership nexus' that the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) also asserts the indivisibility of this relationship. Article 26 of the UNDRIP states:

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.¹²

The right to define land as a communal resource has nonetheless been flagrantly violated by governments and private developers for the sake of economic growth and neo-liberal-inspired development. This is so despite the fact that land ownership and the right to a mode of livelihood (right to development) are indissolubly connected as far as indigenous peoples are concerned. UNDRIP further affirms indigenous rights in this regard:

Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupations or use, as well as those which they have otherwise acquired.¹³

Land also has a symbolic value to indigenous peoples. Because land constitutes the foundation of their livelihood, it also serves as the *raison d'être* of their culture.¹⁴

In a nutshell, land and environment constitute the foundation, and in fact the very means of survival for indigenous livelihoods. From this perspective, encroachment of indigenous land in any way or depriving indigenous people access to their ancestral land altogether can be debilitating to their very survival. Studies indicate that this is indeed the case. Albert Barume, in his study, *Land rights of indigenous peoples in Africa*, cites cases in which indigenous peoples' livelihoods have been destroyed or adversely affected by encroachment on their ancestral land.¹⁵

On the other hand, the essence of Western modernisation is based on profit and the market. The entire market system which is based on the principle of profit maximisation – be it that of simple commodity production or corporate monopolies – is incompatible with indigenous livelihood systems. It is well known that industrialisation that generates millions of commodities to supply the market does indeed sacrifice land and the environment to achieve maximisation of profit. According to the market, nature must serve industries; therefore it should give way to the expansion of industries and business. In Africa, tourism constitutes one category of industry while commercial farms and mining constitute another. The quest by governments to generate income and big capitalists to maximise profit through the expansion of these industries results in encroaching on indigenous communities' lands that brings them in collision with indigenous communities.

ENCROACHMENT ON INDIGENOUS PEOPLES' LAND

The major damage that African governments' environment policies inflict on indigenous peoples is through the dispossession of their ancestral land and/or subjecting indigenous land to commercial farms, wildlife reserve, game parks, and the extraction of minerals and oil. Apart from being a violation of the rights of indigenous communities as stipulated in the UNDRIP, encroachment on indigenous land can be fatal or devastating to their livelihood. This encroachment, however, takes place anyway and is still raging through the continent in different forms. The following section provides a brief discussion of the types of encroachment taking place.

COMMERCIAL FARMS

Agriculture is indeed the mainstay of the economies of many sub-Saharan African countries. Macro-economic policies on agriculture postulating economic growth are advanced by governments in a variety of ways depending on the orientation of the party in power, but all advance agricultural expansion as a driving force towards their ultimate goal: industrialisation. Industrialisation is equated with modernisation. Five decades have elapsed since the post-colonial state in Africa began experimenting with development policies based on Western (market, capital) theories manufactured in Washington, London or Paris. It is no secret that Africa's agriculture has been in crisis for decades now and a number of African countries

are food insecure and unable to generate or accumulate capital for industrialisation. By all indicators, Africa lags behind the world.

One of the basic problems with the strategy of development that African governments follow is the misconception that an extractive form of economic development is the sure way toward development. This is so despite the fact that industrialisation in the West or elsewhere was achieved at the cost of the environment, which brings us to the issue of the environment/industrialisation binary. Both during the industrial revolution in Europe and after, the expansion of cotton farms in the US and the gold rush to California, or during the modernisation of Japan, there was no concern for the environment except by the indigenous communities. The environment only became a major concern in the late 1960s with an emerging environmental discourse to follow much later. Nevertheless, industrialisation was advanced at the cost of the destruction of the environment and against the overall welfare of indigenous peoples.

The post-independence governments in Africa, which literally stepped into the shoes of the colonial state in terms of ruling society and running government machinery, voluntarily inherited the colonial construct on modernisation and development which, as we have seen, was based on the environment–industrialisation binary.¹⁶ Neo-liberal post-independence governance was thus destined to attain development and modernisation through the same colonial construct. As we discussed above, the colonial construct has it that the livelihood systems of indigenous peoples are condemned to extinction. It goes without saying that indigenous livelihoods and economy have not been considered positively as contributing to capital accumulation or economic growth. On the contrary, they have been subjected to extinction and have had to give way to the neo-liberal development paradigm. Such has always been the dominant perception in post-independence Africa.

It is indeed the prevalence of such a perception that was at the back of the policies that led to the introduction of the many development projects that encroached on indigenous land – encroachment which resulted in the eviction of indigenous communities. What is particularly tragic is the insensitivity on the part of African governments towards the consequences that indigenous communities face as a result of these evictions. There is ample evidence that evictions have been debilitating to indigenous communities and that the consequences border on genocide. Now the question that should arise here is whether or not evicting indigenous communities from their land and habitat constitutes a violation of the right to life.

But what then is the agricultural development that African governments brag about? In the first place, the context needs to be rural rather than just agricultural development if what is aspired to at the end of the day is social development in the proper sense of the term. In Africa there are generally four modes of production in which the rural population is engaged. These are peasant farming, pastoral livestock production, fishing and hunting-gathering. Out of these four, the first two have the capacity to impact positively on national economies if supported by the state with an effective policy on rural development. While peasant farming and fishing are viewed positively, pastoralism and hunter-gathering are not. They are, in fact,

condemned to extinction. Let us now take a glance at the potential that pastoral livestock production has to contribute to the national economy.

In countries like Ethiopia where the pastoral population constitutes roughly 15 to 20 per cent of the population and who inhabit 61 per cent of the landmass, and in whose areas are found natural resources which contribute to the national economy, pastoralism can play a big role in enhancing the national economy. Ethiopia is said to have the second largest number of cattle per head on the continent, and the pastoral community alone has about one million camels.¹⁷ A proper rural development policy in Ethiopia would consider the pastoral livestock production sector as one source of accumulation and wealth creation, and render it the support that it needs. One important support could be setting up a market mechanism that enables pastoralists to sell their animals. The advantage here is mutual: pastoralists would sell their animals with better prices, accumulate wealth and diversify their livelihoods, particularly to other trade; and the government could also enhance its revenue by exporting animals. There are also a number of benefits that government or big business can derive from pastoral livestock production, thereby contributing to the national economy. The government or entrepreneurs can embark on industries associated with dairy products such as milk and yoghurt distribution, cheese and butter making, meat processing, hides and skin (leather and shoes), and so on. If recognised and supported, pastoralists can contribute to the national economy in ways that we described above, thereby supporting themselves through wealth creation. Beyond a shadow of doubt, in countries such as Ethiopia, one of the most impoverished countries in the world by the Human Development Index, this can constitute a big leap in poverty reduction.

Unfortunately, many governments in Africa resort to evicting indigenous communities from their land for commercial and mechanised farms. Tragically, indigenous communities are not even paid compensation or provided with alternative land. In Ethiopia the imperial government evicted the Kereyu pastoralists in the Awash Valley in the late 1950s using their land for sugarcane plantations that supply the sugar factory at nearby Wonji. The emperor's government promised Kereyu elders that they would be compensated. That never happened during the reign of the emperor, nor did it happen during the military regime. Sadly, more than five decades later the Kereyu still await compensation. Nothing beneficial either in terms of employment or social services such as schools and clinics has ever trickled down to the Kereyu community, who as a result live in abject poverty.¹⁸

The sugarcane plantation was enforced on indigenous land ostensibly on grounds that it would advance agricultural development and growth for the national economy, but this is not the case. Fifty years after the eviction of the Kereyu, Ethiopia remains impoverished and the economy has not yet revived to the level of reducing (not to speak of ending) poverty. Its agricultural sector is hardly developed enough to ward off gross food insecurity. The sugarcane plantation has only benefited the regime and its Dutch partner.¹⁹

As a result, Ethiopia characteristically extends its begging bowls to donors literally every year. What is apparent is that as long as the institutions of governance are not developmental, sacrificing the poor – including indigenous communities – for the interests and whims of the

political elite is problematic, and therefore the excuse that African governments use to evict indigenous communities from their habitat only benefits the political elite in amassing wealth and strengthening their security apparatus.

LAND GRAB

One of the major ways of dispossessing indigenous communities of their land is a sheer land grab that seizes their land, by hook or by crook. The most common way of land grabbing is when officials use their power to take over indigenous land. Following the decolonisation, power has become the major way to accumulate wealth. Fixed assets and properties are seized by officials for their own personal use and ownership.

The other form of land grab is conceding large tracts of land to developers who are in the main foreign investors. A typical example is what is going on in the southwest of Ethiopia. Since 2010, the government has begun to concede large tracts of indigenous land to foreign investors by evicting the pastoralists without compensation. Investors from India, Saudi Arabia and China, among others, are awarded with cheap leases that last a century.²⁰ In this scheme, the investors aim at producing rice, palm oil and other cereals for export directly to their countries. The produce is not for sale in Ethiopia, and thwarts the local expectation of enhanced food security. Members of the local community, indigenous in the main, do not even benefit from being employed at the commercial farms as the investors mostly employ skilled labourers, many of whom come from their respective countries.

We need to mention here that Kenya's indigenous communities have a unique experience as far as being evicted from their ancestral habitat goes. Pastoral land, which was owned by the community collectively, was turned into private holdings when the British colonised Kenya. Upon independence, the political elite continued with the colonial land policy and took over the land confiscated by the British and did not return it to the indigenous communities. While indigenous communities suffered severe poverty as a result, their confiscated land became a source of wealth and prosperity for the political and business elite.²¹ Although the official 'protective' guise for indigenous land was the 'Trust Land Act', implying that local authorities were entrusted with the responsibility of managing indigenous land, the elite actually managed to abuse the essence of the 'Trust Land Act' to its own benefit.

International instruments such as the ILO Convention 169²² and the UN Development Goals (2008) hold that any development project to be undertaken on indigenous land should first of all secure free, prior and informed consent from the indigenous communities. 'Free consent' implies no use of coercion, intimidation or blackmail. 'Prior consent' implies that indigenous communities should not be met with *fait accompli*. The project idea must be discussed with them and their consent is required. This should be followed by consultation on the project plan, and indigenous communities must have the chance to weigh up the benefits of the project with their communities. This is what prior consent implies. 'Informed consent' implies that indigenous communities should be fully informed of the benefits and consequences of the project. No information should be withheld from them.

CONSERVATION

Taking over indigenous land for wildlife conservation and game parks, and evicting the community has become common in East Africa. The tourism industry has become a major foreign exchange earner, particularly for Tanzania, constituting the second largest foreign exchange earner, and for Kenya the third largest. Tanzania has allocated 37,7 per cent of its territory to protected areas while Kenya has allocated 12,15 per cent of its land mass.²³ In all these enterprises, pastoral communities have been evicted without compensation. The Working Group on Article 8J states:

In Tanzania and Kenya, for example, the expulsions of Maasai from their ancestral territories, which started during the colonial era, are continuing today. The creation of the national parks of Manyara, Tarangire, Ngorongoro, Serengeti and Mkomazi in Tanzania, and of Amboseli, Maasai Mara, Lake Bogoria and others in Kenya, has each time led to the eviction of indigenous Maasai from their ancestral land without compensation – supposedly in the national interest.²⁴

As Barume argues further:

This same trend of promoting conservation interests has also led to forced evictions of pastoralists in Tanzania, such as the cases of Mkomazi and Usangu Plains, and to what happened in November 1970, when the homelands of the Batwa of the Kahuzu-Biega forests in eastern Democratic Republic of Congo, were gazetted as a National Park without their prior and informed consent. Nor did, for example, the Maasai of the Ngorongoro Conservation Area in Tanzania, the Bagyeli of Cameroon, the Hadzabe of Tanzania, the Batwa of Uganda and Rwanda, the Khomani San of South Africa, get consulted in relation to the creation of the Serengeti National Park, the Amboseli National Park, the Campo Ma'an National Park, Ngorongoro Conservation Area and the Mgahinga and Bwindi National Parks, the Nyungwe Forest, the Kgalagadi Transfrontier Park, respectively. In all these areas, community land rights were ignored as if they had never existed.²⁵

In Ethiopia, large tracts of land in the Awash Valley and along the Awash River were turned into a wildlife conservancy called the Awash National Park. The land was originally pastoral land belonging to the Kereyu and Afar communities, both of which were evicted from their ancestral land without compensation. As with the sugarcane plantation in the same valley, the Afar and Kereyu pastoral communities were not consulted prior to the project, nor were they ever compensated for the loss of their land.

LOGGING AND EXTRACTIVE INDUSTRIES

Many indigenous communities such as hunter-gatherers live in the forest and depend on it for their survival. As the UN's *The state of the world's indigenous peoples* indicates:

For many indigenous peoples, the forest plays an essential part in ensuring their physical, cultural, spiritual and economic well-being by giving them access to secure means of subsistence, medicinal plants and the ability to practice their customs. However, all this is in severe jeopardy as their forest refuge is increasingly being degraded, destroyed or placed off-limits.²⁶

Their livelihood system is intertwined with the forest, and they coexist with the animals in the forest in a cooperative system that dates back to time immemorial. The advent of colonisation changed all that but without providing a viable livelihood alternative. The post-independence state in Africa continued with these colonial policies and was destined to modernise Africa much in the same way as the colonialists. As in the case of the commercial farms and protected areas, one way of modernisation is commercial logging from forests, the natural habitat of hunter-gatherers.

There is massive logging going on in the natural habitat of indigenous communities in Cameroon and the Democratic Republic of the Congo. Both in the Congo and Cameroon as well as in the Republic of Congo, Gabon and the Central African Republic, a great many indigenous communities live in the forest. That is in keeping with colonisation practices; these states are continuing to extract raw materials for the industries of the West. It is clear that the post-independence African state does not seem to have a clue about the relationship between conservation of nature, the environment and sustainable development. The state seems bent on destroying Africa's forest for commercial purposes. Unfortunately, since all African states are not developmental states with democratic and accountable institutions of governance, it is not difficult to figure out who benefits from these commercial logging activities. The saddest element is that indigenous peoples suffer the most in this profit-driven destruction while powerful politicians and their foreign partners are enriched.

Barume cites the devastating cases of commercial logging in Cameroon, the Democratic Republic of the Congo and Republic of Congo. In Cameroon he writes that:

... an annual production of more than 2.5 million cubic meters of timber, the forestry's sector is the state's third source of hard currency (and) account(s) for 8.9% of the GDP ... in the Republic of Congo ... 1.5 million cubic meters per year ... and 6 million cubic meters a year (in the) Democratic Republic of Congo.²⁷

One can imagine the level of forest destruction on the continent as a whole when 10 million cubic metres of timber are exported from just three countries only.

In the disputed Mau Forest of Kenya, we face a similar problem as far as the livelihood of the indigenous Ogiek hunter-gatherer community goes. Since Kenya's independence in 1963, the Ogiek have been systematically evicted from their natural habitat, the Mau Forest, and forced to live in poverty in the outlying areas. Very few are left in the forest. Their land has been parcelled by land-grabbing officials and big business. Apart from the land grab, logging companies are also involved in massive logging from the forest.

In addition, the Mau Forest serves as the water tower of the country. This function can only continue as long as the forest remains intact. As we have noted, massive logging is taking place by commercial logging companies in complicity with politicians. This will eventually deplete the forest of its trees, yet the government is determined to evict the remaining Ogiek, accusing them of being a threat to the water tower. It is a paradox of historical proportions to accuse a community that has coexisted with the ecosystem for time immemorial of endangering the environment while at the same time looking the other way while logging companies continue with their deforestation activities.

One needs to consider what progressive changes could have occurred in the lives of the poor in general, and those of indigenous peoples specifically, if these states had used the revenues from timber exports, commercial farms and tourism to benefit a judicious and just developmental agenda. That indeed is why democratic governance is at the heart of indigenous peoples' rights issues.

In a similar pattern, indigenous land is encroached upon and also used for the extraction of oil and minerals such as gold, diamonds and coltan, and almost nothing trickles down to the community. In Botswana, the San community was evicted from their habitat, which turned out to be rich in diamonds. Similar situations 'occur in South Africa, Namibia, Tanzania, Kenya and numerous other African countries'.²⁸ When the mineral coltan, used in making mobile phones, was exploited in the indigenous Bawa land in the Democratic Republic of the Congo, the Batwa were evicted in much the same way as the Baka of Cameroon were when tons of cobalt/nickel were extracted from their land.

Africa also has the well-known case of the indigenous Ogoni, a farming and fishing community in the Niger Delta of Nigeria. In 1958 their fate began to worsen when Shell discovered oil in their lands while Nigeria was still a British colony. The Ogoni started to suffer from oil spills along the coast and the continuous burning of gas flares, some of which are close to villages and have been burning for three decades. Villagers are forced to live with the constant noise of the flares, and the area is covered in thick soot, which contaminates water supplies when it rains. Air pollution from the flares results in acid rain and causes respiratory problems. Pipelines run through villages where fertile agricultural land once provided sustenance to the Ogoni.²⁹ The oil companies had 100 oil wells, most of which were owned by Shell, and the oil spills from these wells were severe. A 'fact sheet' on the Ogoni states that 'between 1976 and 1991, almost 3 000 separate oil spills, averaging 700 barrels each, occurred in the Niger delta'.³⁰ The Ogoni pleaded with the government and Shell for years; they then went on to a protest movement after setting up their own organisation, the Movement for the Survival of Ogoni People (MOSOP) led by the Nigerian writer Ken Saro-Wiwa. After years of pleading to no avail, the Ogoni rebelled.

A relatively new element in the forceful eviction of indigenous communities by governments in the name of national development is taking place in Ethiopia as of this writing. The construction of a hydroelectric dam on the Omo River dubbed as 'Gilgel Gibe III' in southern Ethiopia was originally designed as a joint project by the governments of Kenya and Ethiopia. The project drew wide condemnation and resistance because it threatened the lives of indigenous communities in South Omo who were being forced to vacate their lands. Civil

society groups in Kenya and international environmental and human rights organisations advocated against the dam on grounds that it would devastate the livelihoods of indigenous communities in both countries. They also pointed out that the Ethiopian authorities had not conducted an environmental impact assessment before the construction. Donors pulled out as a result and the Kenyan government turned its back on the project. The government of Ethiopia ignored the dissent and bad international publicity, and continued with construction plans. When the indigenous Ngangaton and other communities in South Omo protested against the construction, the Ethiopian government cracked down and rounded up more than one hundred indigenous protestors.

THE CONDITIONS OF THE BASARWA OF BOTSWANA: A REFLECTIVE GLIMPSE

The Basarwa are the San people of Botswana. The San are found in a number of countries in southern Africa including Angola. The San in Botswana refer to themselves as Basarwa. They 'comprise a distinct minority of about 50 000 out of a total population of 1,6 million, or roughly 3% of the population'.³¹ They inhabit the Kalahari Desert and their original livelihood was based on hunting and gathering. Over time they also practiced pastoralism and some farming. As a result of the dispossession of their ancestral land, many of them have ended up in urban areas living as hired labourers on farms and ranches.

Botswana poses a distinct pattern of governance and economic growth in sub-Saharan Africa. Politically, it is alleged to have a more tolerant system of governance than is found in many African countries. Economically, it has recorded growth that is rare in the sub-Saharan context, from which the Basarwa have not benefited. As Mazende writes:

[T]he San (Basarwa) have not enjoyed the socio-economic development that Botswana has achieved over the past two decades of high economic growth. Actually, the San have fared worse than any other community in Botswana. They have become poorer economically and more so socially through the state's relocation policies.³²

Becoming independent in early 1960s, Botswana has traversed a long way to reach where it is now. The modalities of the exclusion, marginalisation and discrimination of the Basarwa seem to be similar to that of Ethiopia's indigenous peoples. In Ethiopia, the marginalisation of indigenous communities began with the process of conquest that took place during the advent of the European Scramble for Africa and the policy of forced assimilation that followed, complemented by a policy of discrimination practised by the political elite of the dominant ethnic groups who held political power. In addition to the dispossession of their land, an official policy of discrimination and forced assimilation was followed. As a result of such history of marginalisation, oppression and discrimination, a condescending attitude developed in the dominant ethnic groups, which later became a function of the official policy towards indigenous peoples. As Mazende writes:

The Basarwa in Botswana seem to face a similar problem. Perceptions are one of the most important aspects of social or human-centred development, particularly with respect to indigenous peoples. Perceptions are a crucial aspect of the life of the San because their plight is, to a large extent, attitudinal in nature; it hinges on the way they are perceived and treated by the mainstream or dominant non-San communities ...³³

Despite Botswana's success stories on the economic growth index, the Basarwa live in abject poverty,³⁴ at the root of which is the lack of official recognition of the Basarwa as an indigenous people. Denial of recognition of indigeneity is almost universally followed in Africa by an official policy of coercion towards indigenous peoples as justification for the dispossession of their land and natural resources. Kenya has done it, Ethiopia and Uganda have done it, and Rwanda has done it – and Botswana has been doing it for decades now. A case in point is the eviction of the Basarwa from the Central Kalahari Game Reserve. The 2008 African Commission on Human and Peoples Rights Report on Botswana states:

In 1961, the Colonial government of Botswana established the more than 52,800 sq. km. Central Kalahari Game Reserve (CKGR) to protect the total supply of some Basarwa groups still pursuing a subsistence hunter-gatherer livelihood. However, in 1997, the Government began to relocate the Basarwa to two settlements just outside the CKGR Kaudwane and New !Xade'.³⁵

Controversy and debate erupted following the eviction of the Basarwa. This led to the formation of a coalition of civic groups and began negotiations with the government. Negotiating with government proved to be futile, so that in 2002 the Basarwa and the coalition decided to take the government of Botswana to court. At that point, the government capped the borehole which was the only source of water for the Basarwa in the reserve. The court proceedings dragged on for a few years, and in 2006 the Basarwa won a historic victory when the High Court of Botswana ruled that the government had acted unconstitutionally when it evicted the Basarwa and said that the Basarwa had the right to return to the reserve. Hundreds of Basarwa went back home as a result.

The Basarwa persisted in negotiating with the government, but the government still refused to let them use the borehole, and they are forced to make an arduous 300-mile round trip to obtain water outside the reserve. Since the borehole was capped, one Basarwa has died of dehydration. With that, the Basarwa took the government to court once again.

CONCLUSION

In indigenous knowledge systems from which culture, tradition and spirituality spring, land, the environment and nature have a special place. Nature and environment assume that level of importance because they serve as the basis and foundation as well as the physical domain of the livelihood systems of indigenous peoples in pastoralism, hunting and gathering, or

fishing. The advent of industrialisation in the North and of colonisation in the South brought forward vested interests of the powerful ruling elite who opted to sacrifice the interests of the majority in the name of development and modernisation. Private ownership and the market being the gospels of modernisation went contrary to the very credo of the indigenous knowledge system which is based on community ownership and sharing. In the interests of capitalised development and the profit motive, the welfare of indigenous peoples has been squandered. Consequently, for indigenous people survival from such a power-based onslaught has become a daily struggle for survival.

Given the dire circumstances emanating from this situation, the relationship between land-environment-nature and indigenous peoples should not be seen in isolation from the general imperatives of a judicious state–society relationship where the developmental foundations are freedom, democracy and justice. The life-and-death situations of indigenous peoples on the continent discussed above must be seen from this perspective.

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- 5 See generally the Report of the African Commission's Working Group on Indigenous Populations/Communities Research and Information Visit to Kenya (2010).
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 - 19 Handels Vereniging Amsterdam (HVA) was the company that was the principal partner in the project. The HVA moved the sugar factory to Ethiopia from Indonesia when Sukarno's government became more patriotic.
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 - 31 Taylor, M. 2004. The past and future of San land rights in Botswana, in *Indigenous peoples' rights in southern Africa*. Copenhagen: IWGIA, p.138
 - 32 Mazende, I., 2004. Equality and ethnicity: How equal are San in Botswana? in *Indigenous peoples' rights in southern Africa*. Copenhagen: IWGIA, p.138
 - 33 Ibid., pp.134–135
 - 34 It does not necessarily follow that social development has taken place. Being economically opulent does not necessarily mean that a society is socially developed. Saudi Arabia has one of the highest living standards but its women do not even have the right to drive. Until October 2011, women in Saudi Arabia could not vote. According to proponents of the dominant discourse this constitutes development; according to its counter-discourse, it does not.
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Gender and indigenous peoples' rights

Soyata Maiga

INTRODUCTION

African indigenous women are often subjected to double discrimination.¹ First, being a woman in Africa subjects a person to differentiated citizenship within the family, the community and the state.² Second, indigenous women face further discrimination as a result of being indigenous. Indigenous peoples in Africa are still among the most vulnerable groups, and continue to be subjected to various forms of discrimination, in particular because of their livelihood and their attachment to their culture. Indigenous communities in Africa have thus had their most basic rights violated by authorities of their countries who refuse to grant them equal recognition before the law. Instead, they are treated as disadvantaged minorities who, due to their lifestyle, are self-marginalised with little desire to play a role in the nation-building project.³ In this context it is difficult for indigenous women to have their rights respected. Many indigenous women are victims of several forms of physical, psychological and sexual violence, and live in vulnerable conditions and often extreme poverty.⁴

Within their own communities, indigenous women confront customs and traditions which place little emphasis on women's rights and which may be justified through the protection of collective rights at the expense of the individual rights of women to dignity and safety.⁵ This is a false dichotomy, however, given that the protection of indigenous women's rights is consistent with empowered, dynamic cultural communities. This view is given poignancy by Sylvain's comments:

The situation of indigenous women complicates efforts to reconcile individual and group rights because intersectional discrimination also implicates political dynamics internal to their communities. This is often the case because 'internal' political dynamics are shaped by the broader context of intersecting inequalities in which indigenous communities are embedded.⁶

Ensuring that indigenous women benefit from the protection of their cultural heritage as well as their human rights is a responsibility of all states under international law. However, many governments lack the political will to ensure the effective implementation of the rights of indigenous women as recognised by international and regional human rights instruments on the rights of women. Conveniently, states often blame indigenous cultures for non-action in addressing gender violence against indigenous women. While it may be acceded, as do Banda and Chinkin, that the potential for gender oppression increases when women are viewed as the embodiment of group identity and the repositories of culture,⁷ other scholars such as Tamale and this author hold a contrary view, namely that '[r]adical transformation of women's sexuality can happen within culture'.⁸

Protecting the rights of indigenous women within their own communities depends on many factors, including developing partnerships with communities themselves to ensure the implementation of national laws of the country where they live as well as international and regional human rights instruments which are ratified by states. Protecting indigenous women's rights is a twofold process: protection of individual rights and protection of collective rights.⁹ Individual rights in this context include the right to equality, the right to education, the right to health including reproductive health services, the rights to bodily integrity and security, and the right to marry the person of one's choosing and to form a family. Collective rights include the rights to culture, language, beliefs, development, self-determination and control over natural resources and communal lands, as well as the right to participation in decision making that affects the community.

In this chapter we will review the legal framework at international and regional level in juxtaposition with the specific challenges that indigenous women face in exercising their individual and collective rights.

THE INTERNATIONAL AND REGIONAL LEGAL FRAMEWORK

It is difficult to speak about the rights of African indigenous women without reference to the international law of human rights. African states have ratified several international legal instruments, and the heads of states and governments committed themselves, in the Solemn Declaration of Heads of States on Gender Equality in Africa adopted in 2004,¹⁰ to eliminate all forms of discrimination against women.¹¹ African indigenous women are rights holders under both the international women's rights framework as well as international legal frameworks on minorities and indigenous peoples. The Beijing Declaration of Women of 1995 urges governments and non-state actors to take concrete steps to promote and strengthen national policies and programmes for indigenous women, in particular with regard to their right to health, education and economic development.¹²

INTERNATIONAL CONVENTIONS AND DECLARATIONS

The Convention on the Elimination of All Forms of Discrimination Against Women¹³ (CEDAW) came into force in September 1981, and has been ratified by all African countries except Sudan and Somalia. Moreover, very few African nations entered any reservations to the CEDAW provisions, accepting in full the obligations under the treaty. It reaffirms the principle of equality, and calls upon states parties to take 'all appropriate measures, including legislative measures, to ensure the full development and advancement of women for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on the basis of equality with men'.¹⁴

CEDAW is monitored by a committee of experts, the United Nations Committee on the Elimination of Discrimination against Women (CEDAW Committee), which receives complaints and state periodic reports, and which issues general recommendations. The Committee has issued a number of general recommendations relating to the rights of indigenous women. Under CEDAW, states must take measures to modify social and cultural patterns that discriminate against women (Article 5(a)), but in practice the implementation of these measures can be challenging. The CEDAW Committee in General Recommendation 19 states that:

[t]raditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles perpetuate widespread practices involving violence or coercion, such as family violence and abuse, forced marriage, dowry deaths, acid attacks and female circumcision. Such prejudices and practices may justify gender-based violence as a form of protection or control of women. The effect of such violence on the physical and mental integrity of women is to deprive them the equal enjoyment, exercise and knowledge of human rights and fundamental freedoms.

The Human Rights Committee, which monitors the International Covenant on Civil and Political Rights, has also drawn attention to the conflict between some collective rights and the rights of women. In General Comment 28, it stated that:

[those] rights which persons belonging to minorities enjoy under article 27 of the Covenant in respect of their language, culture and religion do not authorise any State, group or person to violate the right to the equal enjoyment by women of any Covenant rights, including the right to equal protection of the law.¹⁵

In addition to addressing the tension between women's rights and certain cultural practices, the CEDAW Committee has recognised the interconnection between indigenous women's rights and the collective rights of indigenous communities. For example, when Uganda presented its periodic report before the Committee in October 2010, indigenous Ugandan women submitted an alternative report to the Committee.¹⁶ They stressed the 'need to establish a link between violations of their human rights and the expulsion of their peoples from their ancestral lands and dispossession of land which they now faced'.

In its final comments,¹⁷ the Committee noted with concern the marginalisation of indigenous Batwa women. In its final recommendations, the Committee

... urged the State Party to continue to intensify the implementation of gender-sensitive poverty reduction and development programmes in rural and urban areas and to pay particular attention to the Batwa women in the development of such programmes. The Committee also reiterated its recommendation that the State party continue to develop targeted policies and support services for women aimed at alleviating and reducing poverty.¹⁸

The tension between collective rights and the rights of individual women remains a complex issue under CEDAW. For indigenous women, who see themselves as the protectors and transmitters of their community's culture, this tension makes using CEDAW as a framework for empowerment a challenging process. Navigating a process of cultural change that empowers women while also working within cultural structures that are the root of their identity is a daily struggle for many indigenous women.

The international legal framework on minorities and indigenous peoples applies equally to indigenous women and men in their communities. Moreover, these instruments recognise that men and women are affected differently by discrimination. The Committee that monitors the Convention on the Elimination of all Forms of Racial Discrimination (CERD), has noted that:

... racial discrimination does not always affect women and men equally or in the same way. There are circumstances in which racial discrimination only or primarily affects women, or affects women in a different way, or to a different degree than men. Such racial discrimination will often escape detection if there is no explicit recognition or acknowledgement of the different life experiences of women and men, in areas of both public and private life.¹⁹

The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities²⁰ and the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) both include specific protections for women. UNDRIP makes it clear that states have a duty to work in collaboration with indigenous peoples to ensure that women's rights, particularly the right to be free from all forms of violence, are protected (Article 22), and that the states must put in place special measures to enhance the conditions of education, employment, vocational training and retraining, housing, sanitation, health and social security for indigenous women. UNDRIP's provisions are an important recognition of the importance of addressing the needs of indigenous women within the context of their community life. However, UNDRIP remains 'soft law'. Unlike CEDAW, it is not a treaty; nevertheless, it can provide important guidance for communities and policymakers in addressing the unique situation of indigenous women.

UNITED NATIONS MECHANISMS

In addition to international normative frameworks, there are several special mechanisms within the UN system on the rights of indigenous peoples and women.²¹ The bodies provide indigenous women, communities and their allies with an opportunity to address key issues of concern to indigenous women and to draw attention to emerging human rights concerns. The

Working Group on Indigenous Peoples, for example, has conducted studies on the participation of indigenous peoples in decision making on the right of indigenous peoples to education.²² The UN Special Rapporteur on Indigenous Peoples was first established in 2001, and its mandate was renewed in 2004 and 2007, which is to promote good practice and to carry out country missions, making recommendations to stakeholders to improve the situation of indigenous peoples' rights. For example, during his mission to Kenya in December 2006, the Special Rapporteur urged the Kenyan government to review laws and regulations that affect property rights and which discriminate against indigenous women, especially those who are widows and divorced.²³

THE AFRICAN LEGAL FRAMEWORK

The African Charter on Human and Peoples' Rights²⁴ entered into force in 1986 and was ratified by 53 African countries. The African Charter established the African Commission on Human and Peoples' Rights (ACHPR), which has been instrumental in bringing attention to the plight of indigenous peoples and indigenous women across the continent. Despite the massive violations of rights of indigenous women, it is important to note that the ACHPR has received to date only very few communications solely related to women's rights, and none of them raise the issue of indigenous women.²⁵

Despite this, the ACHPR adopted Resolution 183 (XLIX) 2011 at the 49th Ordinary Session of the ACHPR in 2011 on the situation of indigenous women in Africa. The resolution urged governments to 'pay special attention to the status of indigenous women in their countries and to adopt laws, policies, and specific programs to promote and protect all their human rights'.²⁶ The Resolution also specified that 'respect for the rights of indigenous women passes necessarily through the respect for the collective rights of indigenous populations' and recognises 'the vital role of indigenous women in the conservation and preservation of natural resources, and in the development and transmission of knowledge and of indigenous culture'.²⁷

The ACHPR also noted 'the continuing violence and multiple forms of discrimination faced by indigenous women and the marginalisation they experience in all spheres of society'.²⁸ In addition, the ACHPR expressed its concern about 'the fact that the expropriation of indigenous populations' ancestral lands and the prohibition of their access to the natural resources on these lands has a particularly serious impact on the lives of indigenous women'.²⁹ The resolution also underscores the 'high rate of maternal mortality of indigenous women and cases of illnesses affecting them, which could have been prevented if they had proper health care facilities'.³⁰

Finally, the resolution urged states parties to:

1. Collect disaggregated data on the general situation of indigenous women, and 2. Pay special attention to the status of indigenous women in their countries and to adopt laws, policies and specific programs to promote and protect all their human rights.³¹

Despite this important communication from the Commission, the vast majority of indigenous women across Africa remain unaware of their rights and the possibility of redress at the African Commission. Several provisions of the Charter can be invoked for the protection of indigenous women's rights, both in respect of individual rights as well as collective rights. Article 2 establishes the principle of non-discrimination; Article 19 provides for equality of peoples in dignity and rights; Article 21 guarantees the people the free disposal of their wealth and natural resources; Article 22 concerns the right of peoples to their economic, social and cultural development with due regard to their freedom and identity, and equal enjoyment of the heritage; and Article 24 guarantees the right of peoples to a generally satisfactory environment favourable to their development.

In its effort to raise awareness of the rights of women and indigenous communities, the African Commission also has established special mechanisms that relate to these concerns: the Special Rapporteur on the Rights of Women in Africa and the Working Group on Indigenous Populations/Communities in Africa deal with the issue of the rights of indigenous women. The Special Rapporteur on the Rights of Women was established in 1998 with the mandate to assist African governments in developing and implementing policies and programmes for the promotion and protection of women's rights, to monitor the implementation of the African Charter and the Maputo Protocol, and to work with stakeholders involved in protecting the rights of women at all levels.³²

The Working Group on Indigenous Populations/Communities was established in 2000 and is mandated to:

- Gather, request, receive and exchange information and communications from all relevant sources, including governments, indigenous peoples and their communities and organisations, on violations of their human rights and fundamental freedoms;
- Conduct country visits to examine the human rights situation of indigenous populations/communities;
- Make recommendations on the measures and activities to prevent and remedy violations of human rights and fundamental freedoms of indigenous populations/communities.

To date, the Working Group has conducted visits and research in 14 states parties in which indigenous communities are found, and made recommendations to states and other stakeholders. It also organised three regional seminars to raise awareness on the rights of indigenous populations/communities.

During its information and research visit to Kenya in March 2010, for example, the Working Group recommended that the government take

... active steps to effectively eradicate female genital mutilation in all communities using appropriate and socially acceptable methods ' and 'ensure that adequate facilities and infrastructures in the

field of health are available to address the problem of high rates of maternal and infant mortality among indigenous communities arising from inadequate facilities near these communities.³³

These types of recommendation can subsequently be used by indigenous women and their allies for advocacy at national level.

In the report it was mentioned that states have a duty to take steps to protect the rights of indigenous peoples including the adoption of non-discriminatory laws. It appears from several reports of the Working Group that states have rarely explicitly included the recognition and protection of indigenous populations in their national legislation. It is also important to note that many of these measures are ad hoc and not a national policy.³⁴

The ACHPR also monitors the implementation of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. To date, 30 countries have ratified the Maputo Protocol: Angola, Benin, Burkina Faso, Cameroon, Cape Verde, Comoros Islands, Democratic Republic of the Congo, Djibouti, Gambia, Ghana, Guinea Bissau, Equatorial Guinea, Libya, Lesotho, Liberia, Mali, Malawi, Mozambique, Mauritania, Namibia, Nigeria, Rwanda, South Africa, Senegal, Seychelles, Tanzania, Togo, Uganda, Zambia and Zimbabwe. However, some countries have signed without having ratified.³⁵

Although the rights of indigenous women are not specifically addressed in the Maputo Protocol, several of its articles are relevant to the protection of this group. It should be noted that the protection of individual rights of indigenous women requires a combination of various regional and international instruments. Article 2 provides that states undertake to prohibit and punish all forms of discrimination and harmful practices which endanger the health and well-being of women. Article 4 provides that states undertake to actively promote peace education through teaching programmes and social communication in order to eradicate elements in traditional and cultural beliefs and attitudes. Article 5 provides that states shall prohibit and punish all forms of female genital mutilation; provide necessary support to victims of harmful practices (health services, legal and judiciary assistance); and protect women and girls who run the risk of such practices or any form of violence, abuse and intolerance. Articles 6 and 7 set the minimum age of marriage at 18 years; women shall have the same rights as men with regard to the guardianship and nationality of their children and in the case of separation, divorce and marriage annulment. According to Article 8, states must ensure the effective access of women to legal and judicial services; law enforcement organs are specified at all levels so they can interpret and enforce equal rights between men and women; and the reform of existing discriminatory laws and practice is required. Under Article 9, member states should take specific positive action to promote participative governance and the equal participation of women in the political life of their countries. Article 12 provides that states must ensure equal opportunity in and access to education and training. Article 13 calls upon states to promote and support the occupations and economic activities of women, particularly in the informal sector. Article 14 urges states to take all appropriate measures to ensure women's access to adequate health services, at affordable prices and within reasonable distances, including information programmes, education and communication for

women, particularly those living in rural areas; and to protect their reproductive rights, in particular by authorising medical abortion. Article 15 provides that member states ensure women's right of access to nutritious and adequate food, drinking water, sources of domestic fuel, land and the means of food production.

Article 18(2)(c) calls upon states to take necessary measures to protect and enable the development of women's knowledge in the field of indigenous technologies. This article is very important in the promotion and preservation of traditional knowledge of women in relation to natural resources. Indeed, traditional knowledge on the use and conservation of certain wild plants is transmitted from mother to daughter in indigenous communities. The right of access to land and natural resource use by indigenous women must be recognised and protected by national legislation through the adoption of specific measures, thus the prohibition of access to land and natural resources is a violation of the rights enshrined in the Protocol. However, despite the existence of restrictive policies in land and cases of expulsion of indigenous peoples from their ancestral lands, no case has been made by indigenous women or by NGOs before the ACHPR under the provisions of the Maputo Protocol.³⁶

Under Articles 20 to 24, states must ensure the protection of poor women, female heads of households and women from marginalised population groups, and provide an environment suitable to their conditions and with their special physical, economic and social needs.

The Maputo Protocol is an important document for the protection of all African women, and should be an often-used tool in the struggles that indigenous women face to promote their own rights. However, the fact that the rights of indigenous women are not specifically addressed in the Protocol highlights the ongoing struggle of African indigenous women for the recognition of their unique needs. Indigenous women in Africa often see themselves as an integral part of the movement for recognition of communal rights, but are often marginalised from mainstream feminist and women's rights networks. This continues to hamper their ability to simultaneously engage with and link between women's rights frameworks and indigenous rights frameworks, so as to most effectively empower and protect indigenous women.

CHALLENGES FACING INDIGENOUS WOMEN

Despite the existence of international legal instruments and regional protection of collective and individual rights of indigenous women, they face more obstacles than other dominant groups of women both in terms of access and enjoyment of their fundamental rights.

In exercising their right to education and literacy, indigenous women experience more obstacles. The availability of schools near indigenous communities is often very limited; educational dropout among girls remains very high because of early marriage and poverty of parents; the community is also not involved enough or is not sensitised to the benefits of girls' schooling. In several countries, public education policies developed and implemented do not always take into account the culture and lifestyle of indigenous people.

Regarding the right to health, indigenous women's access to health facilities is often difficult due to the remoteness and lack of health centres. In addition, health policies and programmes adopted by states do not include cultural values and tradition that are unique to indigenous peoples. To these challenges is added the lack of training of traditional matrons and the lack of family planning services at the community level. Low levels of community awareness regarding harmful cultural practices, such as female circumcision and widow inheritance/cleansing, and early/forced marriage, remain a concern. Understanding of the negative health consequences of these types of practices for women and girls – such as higher rates of maternal and infant mortality, HIV transmission and obstetric fistula, for instance – as well as the negative impact that these practices have on overall community health, remains low in many communities.

Participation of indigenous people in general in the public and political life of their country is almost non-existent or very limited due to the non-inclusion of areas inhabited by indigenous people in the administrative organisation of states. Added to this, indigenous women suffer from domestic work overload and lack of specific programmes on civic education. Moreover, most governments in Africa design and implement 'one size fits all' policies, which often fail to take into consideration the specific needs and situation of indigenous peoples. These, coupled with the already existing societal bias towards the community, reinforce their marginalisation and segregation by the mainstream societies and governments. Despite these hurdles, African indigenous women in many countries have taken on leadership roles in their communities and in mainstream institutions. Programmes across the continent have worked with indigenous leadership institutions to encourage the integration of women. Positive examples of the integration of women into indigenous justice systems have been seen in diverse groups from Namibia's Owambo community, which has appointed women to its Uukwambi courts, to the Turkana of Kenya who have integrated women paralegals into their traditional dispute resolution systems.³⁷ Moreover, international and domestic policies can help ensure that indigenous women have space to take up these roles. The United Nations mechanisms, such as the Permanent Forum on Indigenous Issues support, and donors support indigenous women's attendance at international and regional meetings on indigenous concerns. National policies supporting the participation of women and marginalised groups in political life can also have an impact. During the 2013 elections in Kenya, new constitutional provisions that reserved seats for women and marginalised groups at the local and national level were put in place. Indigenous women from communities across the country, such as the Maasai, Pokot, Rendille, El Molo, Turkana and many others, ran for office in the general elections.³⁸

Indigenous women have a fundamental right to property and to manage the natural resources and biological heritage of their communities. The relationship between indigenous women and land and property rights is extremely complex and very local. Land management, transfer and inheritance practices vary widely between communities so it can be hard to generalise about women's and girls' rights in the space available here. However, it can be said that with regard to access to land and property, indigenous people in several countries suffer from expropriation in the guise of public interest without prior consultation and compensation,

and are being driven from their ancestral lands by landowners or multinationals acting with the complicity of government agents. Loss of access to traditional territory has negative impacts on women in multiple ways, including loss of access to productive resources, religious and cultural sites, and traditional medicinal plants, as well as the physical and psychological consequences of the often violent evictions that have taken place in many indigenous territories. Meanwhile, women often have no land suitable for them because of the persistence of customs that discriminate against women in land tenure, and lack of land reforms integrating the gender-specific needs of indigenous women. Accordingly, indigenous women in many communities confront an entrenched cycle of poverty as a result of land loss and discrimination.

Despite violations of their rights, the observation was made that indigenous women do not turn to public justice due to illiteracy, ignorance of rights, fear of the administrative complex procedures, non-functionality and/or the unavailability of legal and judicial services for the poor, the remoteness of the courts and women's poverty. Moreover, the existence of traditional mechanisms of conflict resolution perpetuates discriminatory practices against women within the family, for the guardianship of children, in inheritance and for access to land and property.

INCREASING PUBLIC ROLE FOR WOMEN

In June 2008 the Constitutional Court of South Africa recognised the right of a 66-year-old woman to become chief of her Limpopo tribe. The court upheld an appeal by the woman, Tinyiko Nwamitwa-Shilubana, whose chieftainship of the Valoyi tribe near Tzaneen was taken away from her in 1968 on the basis that she was female.³⁹ This landmark decision exemplifies the extent to which courts are interpreting cultural contexts in the light of progressive constitutional and international law, and opens the door for indigenous women's participation in leadership within both customary and state institutions. By examining the horizontal hierarchies within a community, the court demonstrates, as in the *Endorois* case discussed throughout this volume, that courts have the potential to expand spaces for participation for historically marginalised groups, such as women.

Outside the mediatory role of courts, the role of women has been crucial in resolving inter-ethnic tensions. In general, in matters of conflict resolution, there are usually traditional systems accessible to and culturally accepted by all members of indigenous communities, which reflect a moral binding power on decisions taken. The traditional system is considered as belonging to the community, and is based on customary law, norms and cultural values of the community concerned. With regard to indigenous communities, it was noted that:

... people have confidence in traditional institutions of conflict management because they understand them and appreciate their mechanisms and the context in which they operate. Since the system is based on customary law and order, people think only the truth can be revealed.⁴⁰

It was also noted that the mechanisms of traditional conflict resolution are protected from corruption. Older indigenous women have a certain degree of respect from other members, and play an important role in the pacification of social relations and decision making regarding the affairs of the community. The young indigenous woman, on the other hand, has a very limited participation in decision making within the indigenous community, in conjunction with the conflict resolution mechanisms. Indigenous women are marginalised in participation in public bodies, even when their communities are concerned. An example of non-participation in group discussions, such as peace agreements due to conflicts between clans, is the Gurgura Issa of Somali in eastern Ethiopia who reached a peace agreement without taking into account women's concerns, although the women could have provided an important support for greater harmony between the indigenous communities involved. This marginalisation, which is justified by the low status of women for cultural reasons, excludes more than half of the population and can in no way bring about peace.⁴¹

HUMAN RIGHTS CONCERNS FOR WOMEN AND GIRLS

It was mentioned earlier that the main feature of the rights of indigenous women is that they are subsidiary to collective rights, and rely on the customs and traditions of the community. It is thus difficult to protect and implement the human rights of indigenous women. Indigenous women in Africa are very vulnerable because they are poor and illiterate, and are not made aware of their rights or remedies available for violations of these rights. Moreover, they often live in remote areas and the distances that separate them from basic services such as health centres, schools, courts and registration centres are very long with few means of transportation available. Further obstacles are the language barrier and their attachment to their cultural values, which often makes them regarded by dominant groups as 'barbarians', 'wild' or 'obsolete'. All these have had the effect of minimising the impact of laws and international and regional instruments on the rights of indigenous women, which are often not translated into languages spoken by indigenous peoples. States should adopt special measures in different areas for the protection of indigenous women's rights.⁴²

Many African constitutions enshrine the principle of equality regardless of gender, ethnicity or language. The Ethiopian Constitution contains a clause recognising the existence of discrimination based on gender.⁴³ The Namibian Constitution itself provides for special measures in the identification of special discrimination which women suffer, and refers to the establishment of legislation to fight against this phenomenon.⁴⁴ The Constitution of Uganda⁴⁵ identifies the historical imbalances faced by women, introduces equality for women in general, and provides the right to affirmative action, as do those of South Africa⁴⁶ and Ethiopia.⁴⁷

As for the specific recognition of indigenous peoples and their rights, the principle of non-discrimination was not addressed. In South Africa, for example, courses on gender equality and preventing discrimination have been put in place,⁴⁸ but the discrimination faced by

indigenous people in that country has continued. Chad has proscribed in its constitution any custom which affects inequality of its citizens.⁴⁹

Notwithstanding African states' ratification of international and regional human rights instruments with regard to the rights of women and the creation of institutional mechanisms, such as ministries in charge of protection of women and families in several states, the situation of indigenous women has seen little improvement in practice due to lack of affirmative action in their favour with regard to policies, plans and developmental programmes.

RIGHT TO EDUCATION

Indigenous peoples' right to education has been undermined in many countries as a result of multiple factors. Decades of marginalisation have made accessing education a challenge in many indigenous communities. Lack of physical access, lack of financial access, language barriers, discriminatory educational texts and failure to provide culturally relevant material, as well as other factors, have led to the failure to realise the right to education for many African indigenous communities. For indigenous women and girls, other gender-specific factors compound these barriers. With limited resources and opportunities for education, many indigenous families focus on education for boys. Poverty in indigenous communities also links directly to families' decisions to take girls out of school and prepare them for marriage, allowing the collection of bride price. Conflict may also prevent families from allowing girls to attend school, as travelling to distant schools during periods of insecurity is viewed as more dangerous for girls than for boys.

In indigenous communities such as the San, the Batwa, Pygmies, the Mbororo and Amazigh, the level of illiteracy among girls remains high. The school dropout and failure levels are also higher among girls. They undergo more forms of abuse than boys. Moreover, in the San for instance, retention of girls at boarding school makes them more vulnerable to abuse and teen pregnancy. Pregnant girls are expelled from school.⁵⁰

Following a mission to Kenya, the UN Special Rapporteur on the Rights of Indigenous Peoples noted that among the Maasai communities,

... girls occupy a transitional position between the family of their parents and that of their husbands.

In a context dominated by patriarchy, educating girls is not considered important, since many families believe that there is no interest [in granting] an economic investment in the education of a girl as the fruits of this investment [are] collected by the family of her husband.⁵¹

Efforts were made to eliminate these disparities, but they still exist.

Some countries such as Namibia have adopted the goal number 3 of the MDGs – promoting gender equality and empowering women – by developing policies and programmes to eliminate gender-based inequalities for access to education. However, in reality, there are still large regional differences between boys and girls when analysing the illiteracy rate and enrolment in indigenous populated areas.⁵² In the Mbororo community living in Cameroon,

Burkina Faso and Chad, women experience many forms of discrimination, and many girls do not attend school.⁵³

RIGHT TO HEALTH

The CEDAW Committee has recognised the double burden that many indigenous women confront in relation to the right to health. In its General Recommendation No. 24 on women and health, the Committee states that '[w]hile biological differences between women and men may lead to differences in health status, there are societal factors which are determinative of the health status of women ... and which can vary among women themselves' (para. 6). The Committee made clear that indigenousness is one of these social factors and that indigenous women should be the beneficiaries of special measures because of their enhanced vulnerability. Indigenous women, in most cases, live in remote rural areas where there are a small number of traditional midwives and trained personnel in proximity. This causes the rate of maternal and infant mortality among indigenous women still to be very high in all countries of the continent.

In central African states, the Pygmy women continue to have limited access to healthcare services, including those related to maternal and infant health. The nomadic lifestyle of indigenous

Amazigh women in Algeria and Morocco has made access to healthcare centres very difficult, which leads to the deterioration of their health.⁵⁴

In Nigeria, a high incidence of vesico-vaginal fistula was identified in the indigenous community of Fulani because of girls being married off at a very young age. To combat these practices, the government passed a law on child rights, prohibiting the marriage of girls and infants.⁵⁵ The problem of fistula cuts across many indigenous communities in many African countries.

Female genital mutilation (FGM) remains a major obstacle for the respect of the right to physical integrity as it affects the health of indigenous women who undergo this practice in many communities. Indeed, FGM is widely practised in many pastoralist groups in East Africa, in the Horn of Africa and within various groups of pastoralists in West Africa. In the case of Nigeria, for example, only the Fulani do not resort to this practice but despite this fact there is no federal law prohibiting it. In states where FGM is prohibited by law, there often is no mechanism to monitor and control its implementation.⁵⁶

There are also other cultural practices that undermine the dignity of indigenous women. For instance in the Congo, a Bantu man can 'rent' an indigenous woman to have a child with, and then he can return to his community without being subject to prosecution.⁵⁷

FORCED AND EARLY MARRIAGE

As described earlier, poverty often is related to early marriage. In many indigenous communities, there is a strong desire for girls and boys to be educated, but the financial

investment required is beyond the reach of many after decades of marginalisation. As a result, many girls are taken out of school to help with family labour and then to be married early so that their families can benefit from bride-price payments. Traditional patriarchy, in which women are viewed as custodians of the home with little need for education, contributes to the early marriage of indigenous girls.

In Tanzania, for example, Maasai girls are often forced to marry older men before they turn 18.⁵⁸ In several other African countries, customary laws based on patriarchy and the superiority of men over women continue to coexist with modern law. In South Africa, for example, Act 120 of the Customary Marriage Act of 1998⁵⁹ provides for the recognition of customary or traditional marriage. However, this law gives spouses the legal basis for their union. Section 3 of the Act provides for the consent of the intending spouses, aged at least 18 years, before concluding marriage. The law also provides for the equal responsibility of spouses, including among others the ability of a wife to acquire capital, to dispose of and assign it, to sign contracts and to undertake legal actions.⁶⁰ This codification of customs illustrates how a national law may protect traditional customs while at the same time guaranteeing equality between spouses.⁶¹

Many indigenous women are subjected to the practice of polygamy, have no right over their own sexuality, and are exposed to HIV/AIDS. In Ethiopia, for example, polygamy is sanctioned at regional level, but it is often difficult to apply these sanctions in rural areas inhabited by indigenous women and where the latter do not exercise their rights.⁶²

RIGHT TO PERSONAL INTEGRITY AND SECURITY OF THE PERSON

Violence against African indigenous women is a problem on multiple levels. Women often experience violence in the home and in their communities, which may be justified in the name of culture. For instance, domestic violence is often justified by a 'cultural' belief that it is acceptable for a man to use violence to control his wife's behaviour. In addition, women are inordinately affected by conflict and insecurity. Whether in inter-communal or other types of conflict, indigenous women suffer violence during conflict and also are often left as widowed heads of households when men are killed. This enhances indigenous women's vulnerability and often entrenches the cycle of poverty for indigenous communities. Finally, indigenous women are subject to violence based on discriminatory and stereotypical beliefs about their sexuality and culture, as described below.

In several states of central Africa where Pygmy women live, cases of sexual violence, including rape by Bantu men, have been reported. During its mission in Gabon in September 2007, the Working Group gathered information on the situation of indigenous Pygmy women in Gabon who 'suffer from several forms of sexual violence, for being a woman as well as Pygmy'. Many indigenous Pygmy women are living with HIV/AIDS and sexually transmitted diseases, and children born of rapes are abandoned. Owing to poverty and ignorance of their rights, Pygmy women do not resort to national jurisdictions,⁶³ thus, given their limited access to legal aid services and the passive acceptance of their situation, very

few cases end up in court. In countries in conflict such as the eastern DRC, indigenous women are particularly vulnerable. A general view that Pygmy women are endowed with magical qualities where they can cure certain diseases, including HIV/AIDS, renders them dangerously vulnerable.⁶⁴

Some countries have adopted laws on domestic violence that affect mainly indigenous women within and outside their communities. South Africa passed a law on domestic violence which provides that 'any person may apply to a court for protective measures'.⁶⁵ In the case where the court is convinced that there is an act of domestic violence and where the complainant is suffering hardship because of it, the court may order an interim measure of protection. However, the effectiveness of this law will depend on its effective implementation and financial opportunities made available to access justice.⁶⁶

Namibia has a law against domestic violence⁶⁷ but in 2008 the Committee on the Elimination of Racial Discrimination expressed concern about the rape of San women by members of other communities. It was thus recommended that research be conducted and that efforts be pursued to combat prejudice suffered by indigenous women.⁶⁸

Unfortunately, most countries inhabited by indigenous communities, such as Botswana, Kenya and Nigeria, have no specific law against domestic violence or legislation prohibiting violence against indigenous women.⁶⁹

Finally, several African countries have adopted specific measures to eradicate violence against women and harmful practices, but there is no political will to implement them. Furthermore, there are inadequate budgetary allocations for programmes for counselling victims, ignorance of the existence of legal instruments of protection, and fear that indigenous women have access to the administrative and judicial systems.

RIGHT TO PARTICIPATION IN POLITICAL AND DECISION-MAKING PROCESSES

Certain customary laws put indigenous women in an inferior position to men. In some communities, women are not allowed to speak in public at community meetings. However, in some countries these practices are changing slowly.

In South Africa, for instance, some communities are beginning to appreciate the collaboration of women and their role in certain development projects. The Riemvasmaak Namas have made efforts to ensure that women participate in negotiating sessions and recommendations for action by governments. Women of the ǀKhomani form their own working groups during the planning sessions to ensure that their specific contributions related to equal sexes are considered. These measures could therefore inspire the creation of other programmes in the future.⁷⁰

The Namibian government adopted a national policy in 1997 on Gender Equality which aims to ensure equal opportunity in women's participation in all spheres of society.⁷¹ In reality, the number of women ministers, parliamentarians and top executives has increased, but this law has no impact on the representation of indigenous women.⁷²

PROPERTY AND INHERITANCE

Indigenous women live off their land and its natural resources. Unfortunately, in many communities, they may be dispossessed of their land rights. This is the case, for example, for the Batwa women, who lose any family property rights when they become widowed.⁷³

The government of Namibia adopted an Equality Act in July 1996, which provides for the contract of property between spouses.⁷⁴ A registration process for contracts is provided in the law to prevent the sale of family land by one spouse without the consent of the other. In addition, the law on land reform of 2002 establishes a level playing field for women's rights to land. However, it should be noted that this law only protects women who marry under civil law. Indigenous women who marry under customary law are not protected by the Act, and undergo traditional practices characterised by confiscation of property by members of the family of the deceased spouse at the expense of the widow.⁷⁵

The Eritrean government has adopted a proclamation to protect property and inheritance rights. Proclamation No. 58/1994 states that 'every citizen has the right to use land without discrimination'. In some African countries, there are land laws guaranteeing women the ownership of the land they can purchase and use. However, these laws do not apply to indigenous women, who are unaware of their existence.⁷⁶

During his mission in Kenya, the UN Special Rapporteur on Indigenous Peoples urged the Kenyan state to 'review the discriminatory laws and regulations that affect existing property rights for indigenous women, especially widows and divorced women'.⁷⁷

In several countries with indigenous populations, policies related to protection of socio-economic rights do not include the specific needs of indigenous women. The government of Botswana has not taken account of gender equality in the compensation paid following the relocation of indigenous peoples of the Central Kalahari Game Reserve. Indeed, the financial compensation paid by the government was given exclusively to indigenous men while the relocation had a more negative impact on women than on men. This government practice complies with Tswana culture in terms of which cattle are usually owned by men. In the community of Basarwa, women own small livestock from income produced from the sale of hand-made goods.⁷⁸

CONCLUSION

African indigenous women are extremely vulnerable: they are often poor, illiterate and unaware of their rights. They often live in remote rural areas where access to basic services is limited or non-existent, thus the real impact of legal instruments is very limited on their daily lives as they are in a poor situation to exercise their individual rights effectively. Moreover, the language spoken by indigenous women is often not the same as the official language in legal texts protecting women's rights. In some countries, initiatives have been undertaken to translate legal instruments into local languages to make them accessible to indigenous

communities to ensure a better knowledge of such instruments. However, this trend is limited by insufficient financial and human resources necessary for the dissemination and translation of legal texts. It is equally important to translate the various reports of the Working Group on Indigenous Populations/Communities of the ACHPR into local languages spoken by indigenous peoples for a better understanding of their rights and ownership of the recommendations of the ACHPR by states, civil society organisations, and technical and financial partners.

Some NGOs working in the promotion of human rights of indigenous peoples have developed tools to increase awareness among indigenous women of their rights with a view to strengthening their capacities in order to induce them to exercise them. The NGO Forest Peoples Programme published a toolkit in April 2011 on the rights of indigenous women in relation to the African system.⁷⁹ NGOs thus have a very important role to play in promoting and protecting the rights of indigenous women. In addition to organising seminars and workshops to sensitise communities and indigenous peoples to their rights, they can help women who want to assert their rights through free legal aid.

Despite the ratification by African states of all international and regional human rights instruments and the commitment made by heads of states and governments in the Solemn Declaration of Heads of States on Gender Equality in Africa adopted in 2004 to eliminate all forms of discrimination against women, women in Africa continue to be subjected to discrimination and harmful practices. Those from indigenous communities suffer double discrimination and marginalisation including within their communities. The implementation of individual rights of indigenous women is far from reality. Inadequate human and financial resources, the lack of political will of governments, traditional values that discriminate against women and the absence of specific measures of affirmative action are all factors which cause persistent discrimination, insecurity and ignorance in which indigenous women are deliberately targeted.

To change this situation, it is for the states, in collaboration with NGOs and technical and financial partners, to adopt specific policies and programmes of development, both in favour of indigenous communities in general and indigenous women in particular, including a change of models and cultural and social stereotypes.

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5

Constitutional reform and minority exclusion

The case of the Bajuni and Lamu county

Dr Paul Goldsmith

INTRODUCTION

Kenya is going through a sustained transition from a highly centralised state to a political order based on a new federal constitution. For the nation's aggrieved minorities the shift offers hope that devolved governance and the new constitution's provisions to address historical injustices will lead to political integration and a more equitable stake in the national economy. The process of governance reform, however, is also accompanied by state policies promoting large-scale foreign investment in infrastructure and exploitation of the region's natural resources, including newly discovered oil and natural gas reserves.

The Kenya equation at this point in time is one that pits entrenched interests at the centre against the forces of reform that are critical for social integration on the nation's periphery. This chapter examines this thesis by presenting a case study of the Bajuni, a subsection of the northern Swahili population,¹ by assessing the contest between the constitutional reform process and factors sustaining the inferior status of minority communities and indigenous peoples in post-independence Kenya. The case study subsumes a tale of two colliding vectors – constitutional reform and international human rights protocols versus the power of states and international capital.

We begin by contrasting disconnects between historical dynamics on the coast and the modern narrative driving minority exclusion. This establishes the context for documenting issues that threaten the Bajuni and their smaller indigenous neighbours with cultural extinction: land alienation, insecurity, economic malaise, anti-terrorism securitisation policies, and a new port complex in Lamu that is catalysing an avalanche of settlers from outside Kenya's Coast Province.

The new port to be built in Magogoni is the centrepiece of the Lamu-Southern Sudan Transport (LAPSSET) corridor project, which also entails road and rail links to Ethiopia and Sudan, an oil refinery, an international airport and planned settlements in the form of 'tourist

cities' in Lamu, Isiolo and Turkana counties. The project is catalysing massive in-migration, threatening to complete the marginalisation of Lamu District's indigenous inhabitants, and heightening the prospect of these groups' cultural extinction over the coming years.² After decades of stasis and political acquiescence, the Bajuni and their neighbours are beginning to fight for their rights. Encouraged by Kenya's new constitutional dispensation, they are also looking to the UN charter for indigenous peoples and other international protocols to protect their interests in the face of external capital investment and state policy support for extractive industries.

Kenya's shift to a federal system also represents a strategy for buffering the centrifugal influence of identity politics driving conflicts across the greater Horn of Africa region. The resurgent forces of ethnic and sub-regional nationalism are here to stay,³ and the case study will also reflect the relationship between state sovereignty and political legitimacy within the international political order.⁴

THE REGIONAL HISTORICAL BACKDROP

The traditional Bajuni homeland extends from Kismayu in present-day Somalia to the Lamu archipelago in Kenya. The Lamu region, considered by many to be the cradle-land of the Swahili language, is home to a number of diverse communities.⁵ Like the Miji Kenda and Digo, Bajuni oral traditions trace their origins to the predominantly Bantu settlement of Shungwaya. The first mention of the Bajuni in the historical records appears in a document authored by a scribe who refers to them as an unruly and rambunctious group who entered the Lamu area around the same time as the Portuguese arrived.⁶

The Swahili are a cosmopolitan society emerging out of centuries of multicultural interaction. The littoral of eastern Africa provided the template for a co-evolutionary process, fusing ethnically and racially diverse communities into a hybridised population sharing a common cultural, linguistic and religious orientation. This resulted in a culturally unified society but highly fragmented polity historically dominated by a number of city states or sultanates ranging from Mogadishu in Somalia to Kilwa in southern Tanzania. Urban settlements prospered through a combination of trade links with other Western Indian Ocean societies and symbiotic relationships with diverse inhabitants of the coastal hinterland.⁷

Coastal settlements were vulnerable to periodic incursions from the sea, and invaders from the interior also threatened the position of the region's city states.⁸ The architecture of towns and their location reflected the essentially defensive character of settlements; hegemony in the traditional Swahili context was more a function of commercial dominance and cultural influence than military power and political control.

The Swahili compensated for their slender demographic base and limited powers of physical coercion by retaining a key economic role as the Western Indian Ocean's strategic middlemen. Pate, based on the southern side of the island and bearing the same name in the Amu archipelago, was the only power to nominally establish hegemony over a larger region.⁹

Traditional power relations changed during the early decades of the nineteenth century. Zanzibar emerged as a regional player after the Busaidi Arabs of Oman shifted from their capital Muscat to Unguja (the Swahili appellation for the island and town) during the 1830s. After decades of resistance, the Busaidi Arab rulers of Zanzibar subdued Mombasa and the sultanates of Pate, Siyu and Rasini in the Amu archipelago. The Busaidi established clove plantations the profits of which soon surpassed those of ivory and other export commodities – including slaves, whose labour value came to exceed that of the profits realised through their export – and this in turn fuelled the excesses of the slave trade that flourished between 1840 and 1880.

This commerce provided a pretext for British intervention, which in turn increased domestic demand for slave labour in Zanzibar.¹⁰ In the end the sultan of Zanzibar acquiesced to the superior force of the British. Incremental efforts to suppress the trade culminated in an edict banning outright the capture and export of slaves in 1873.

The victor's view of history implicated all the Swahili-speaking peoples of the Kenya coast as accomplices of the Zanzibari Arabs, even though across the coast region the Swahili and their coastal African allies had fought against both Arab and European colonisation.¹¹ Although Zanzibar's Indian merchant community played a far larger role as financiers of the slave trade, the British narrative portrayed the indigenous Swahili as the principal accomplices of the Arab slavers. Colonial administrators substituted rigid European concepts of racial and ethnic identities in place of the integrative dynamics sustaining Swahili society since the previous millennium.¹²

The influence of this narrative after independence in 1963 reinforced the weak position of the Bajuni and other Swahili minority communities in respect of issues of citizenship and economic development. Despite the resistance of indigenous Lamu peoples to Arab *and* British colonialism, prejudicial perceptions provided ideological justification for the alienation of land and marginalisation of Lamu's indigenous economy. Endemic security problems stemming from their location straddling the Somalia–Kenya border further aggravated the violation of basic citizen rights for the Bajuni and smaller communities inhabiting the Lamu District mainland.¹³

THE POST-INDEPENDENCE MILIEU

The historical narrative established by the British colonial regime bypassed the centuries of co-evolutionary interaction supporting integration of diverse racial and ethnic communities into coastal society and instead highlighted the relatively short period of Omani rule in Zanzibar. This reinforced perceptions of the Swahili and other coastal Muslims as quasi-African outsiders in the folk models of upcountry Kenyans. School textbooks, for example, claimed that the Bajuni came from Oman, despite their well-established local roots and clan lineages linking them to Cushitic communities in the interior.¹⁴

Swahili-Arab and coastal African communities shared fears about their position under upcountry African domination during the run-up to Kenya's independence.¹⁵ The Robertson Commission, which was charged with determining the post-independence status of Kenya's

ten-mile strip, judged that the coast should be merged into the new Kenya state. Robertson also validated the legitimacy of coastal concerns by recommending several institutional safeguards pertaining to land, civil service staffing, religious education and human rights.¹⁶ Except for the provision retaining the Kadhi courts for Kenya's Muslim minority, Robertson's recommendations were not implemented.

Divergent post-independence political strategies pursued by Swahili-Arab and Miji Kenda political leaders aggravated pre-existing tensions within the larger coastal population. The former supported the Mwambao movement, which advocated that the coast be reunited with an independent Zanzibar; the Miji Kenda gravitated to the Kenya African Democratic Union (KADU) party's federalism platform, or Majimbo in Swahili.¹⁷

The Kenya government classified the Bajuni, the single-most populous segment of Lamu's Swahili-speaking population, as African.¹⁸ This classification ostensibly conferred greater legitimacy on the Bajuni as Kenya citizens and other advantages under the Africanisation policies adopted by the government of President Jomo Kenyatta. Such distinctions based on race and identity proved to be murkier in practice. The Bajuni broke ranks with their Swahili cohorts supporting Mwambao, and joined the Majimbo movement.

The Mwambao–Majimbo divide subsequently precluded any attempt to foster political unity on the coast. The coastal political arena proved to be so fractious and focused on internal competition that President Kenyatta retreated from political engagement and turned to the provincial administration 'to get things done' instead.¹⁹ The ascendancy of the state machinery over local political leadership was legally formalised – another case of how federal provisions in the Lancaster House Constitution were negated – and this was to prove highly disadvantageous for the coastal population over time.

The official policy of non-interference in the affairs of the Coast Protectorate under British colonial rule morphed into an unofficial but de facto policy of social exclusion after political independence. One source of their economic exclusion was the influence of the government of Kenya's 1965 Sessional Paper No. 10 on African socialism. This paper paid lip service to the dynamics of traditional African egalitarianism but prioritised the development of high-potential regions after independence. Implementation of Kenya's African socialism policy exerted the opposite effect in Kenya's neglected rangelands and on the coast, where economic malaise and administrative neglect prevailed.

Such contradictions are emblematic of Kenya's ruling elite's efforts to promote economic and political progress while retaining structural biases embedded in the post-colonial state. Okello and Owino critique Kenya's entrenched inequalities from the perspective of governance as the outcome of 'rigged development'. The authors see Kenya's political and economic failures as the logical consequence of the policy decisions made by successive governments over time,²⁰ and state that 'policy decisions were not "innocent", but reflected the predominance of certain groups.'²¹

Minority communities perceive the national economy as a zero-sum arena controlled by entrenched state elites, and national politics as a game dominated by the country's large ethnic communities. The inequities generated by Kenya's 'rigged' development form a collinear

Socioeconomic dichotomies defining social exclusion		
Economy	formal and large-scale	small scale and artisanal
Land tenure	individual freehold	communal and trust land
Production	input-intensive monoculture	management intensive and informal
Language	English	Swahili/vernaculars
Education	Modern Western	indigenous and adaptive
Religion	Christianity	Islam, indigenous African

relationship with the matrix of factors defining the social exclusion of Kenya's indigenous minority communities.²² Kenya inherited a highly centralised administration manned by civil servants geared to European criteria of progress that included the interrelated cultural, religious, scientific and linguistic biases listed below.

The rigged economy achieved rapid growth during the first two decades after independence, but Kenya's economic performance was aggravated by the inefficiencies of the government ministries and parastatals as the economy began to slow during the 1980s.²³ The subsequent adoption of neo-liberal policies in the name of structural adjustment was designed to decrease state involvement in the economy and to promote institutional transparency. Instead, Kenyan liberalisation led to unintended consequences, including new and more corrosive forms of institutional mismanagement; declining investment in health, education and other social services; and new forms of 'rigging' with regard to privatisation and access to capital and other resources.

Growing inequalities among politically peripheral ethnic groups, the government's poor human rights record, and weakened state influence in remote regions contributed to a surge in raiding and in the rangelands and other incidents of political violence.²⁴ Bujra concluded that neo-liberal policies and their contradictions were responsible for Kenya's descent into a 'constitutionally failed state'.²⁵

Evidence includes the government's role in supporting episodes of communal violence targeting outsiders from central Kenya during the 1992 and 1997 multiparty elections. For Ndegwa, the attacks in the Rift Valley highlight issues of dual citizenship; he traces the problem to a conflict between assumptions about national citizenship and individuals' allegiance to their ethnic communities. This duality conditions the collective behaviours sustaining the ethnic variable in Kenya's economy and politics, with communal citizenship taking precedence over the individual citizen's responsibilities to the state, especially during conflicts over resources and political power.²⁶

For the Swahili, their dual citizenship problem derives from the historically integrative processes absorbing sub-ethnic identities (e.g. the Bajuni, Wajomvu in Mombasa, or indigenised Arabs like the Hadharami) into a larger multi-ethnic cultural identity. Swahili identity does not qualify as a 'tribe' in Kenya, and in practical terms the mixed heritage of the Swahili reduces individual groups to the status of quasi-citizens in Kenya.

O'Brien attributes the passivity of Kenya's Muslims in the face of marginalisation to the doctrine of Sunni quietism, which preaches that believers should refrain from challenging unjust rule because full redress for injustices will occur in the next world.²⁷ Oded's review of Islam and politics in Kenya correspondingly concluded that the potential for Islamic radicalism in Kenya and East Africa is low.²⁸ He also observes that the inability of Muslims to unite on national and regional levels reduces the likelihood of militant Islamic movements.²⁹ Neither hypothesis accounts for why the Miji Kenda, the 'nine tribes' that constitute the major portion of the coast's population, have until recently been equally fatalistic in response to their marginalisation.³⁰

LAMU'S ENDEMIC SECURITY PROBLEMS

Shortly after Kenya achieved independence in 1963, Somali bandits began crossing the Kenya border and attacking settlements on the mainland of Lamu District.³¹ Defenceless after being disarmed by the government, large numbers of mainland Bajuni were displaced by these *shifita* bandits. Designation of such areas as an operations zone under the Special Districts Act and Outlying Districts Act made the provincial administration the sole source of authority and arbitrator of justice in the new 'operations' areas.³²

Repeated attacks impoverished formerly prosperous Bajuni settlements, and forced the inhabitants to flee their homes and farms. Many of the internally displaced persons (IDPs) returned to their homes, only to suffer more incursions. By 1965 all but a few of the Bajuni inhabiting the area between Mkokoni and Ras Kiamboni had relocated to new villages elsewhere in the district and Lamu town. An agreement between Kenyatta's government and Syad Barre's Somali regime in 1969 formally ended the hostilities. By that time the mainland Bajuni had been scattered across the district and beyond. Many of the IDPs migrated south during the following years, a number of them settling in southern Tanzania.

The emergency laws and a new indemnity act militated against their seeking redress or compensation from the government. The hostile legal regime also contributed to an informal regime of social exclusion that defined Kenya's ethnic-racial status quo for the next several decades. Kenya's parliament subsequently passed the Indemnity Act Cap 44 in 1972, protecting the state against the claims of the many innocent Somali, Borana, Bajuni and other victims of the *shifita* war.

While Lamu's Swahili, Bajuni and Aweer³³ inhabitants have consistently borne the brunt of the area's poor security, the behaviour of state security forces has only aggravated their dilemma. Poachers replaced the *shifita* raiders and appeared to enjoy immunity as they decimated the once-common rhino and large herds of elephant. Kipini became the port for a pipeline funnelling ivory abroad – civil servants managed the commodity chain presided over by the Kenyatta political elite. Caught between *shifita* and the security forces, the Aweer and remaining Bajuni cultivators accepted the presence of poachers among them, even though some were known to be among the *shifita* who raided them in the recent past.

Although security remained a major problem on the mainland, Lamu's economy rebounded during the 1980s. Remittances flowed in from abroad, the dhow trade revived, and locals working in Saudi Arabia and the Gulf returned to build houses. The indigenous mangrove trade spiked, the market for fish improved, and tourism sustained the revival of woodcarving and other traditional crafts. The boom proved temporary.

The collapse of the Somali state in 1991 prompted new forms of violent conflict across the southern region of Somalia. Developments across the border prompted a massive refugee exodus into Kenya. Weapons flowed into North-eastern Province; banditry erupted in an arc along the Tana River extending from northern Meru to Lamu. The economic revival faltered as highwaymen attacking transport on the Malindi-Mokowe road interrupted commerce. Lamu's tourist sector went into decline following the explosion of pre-electoral violence in the Mombasa suburb of Likoni in August of 1997. Indigenous settlements continued to suffer the effects of insecurity despite the full complement of Kenya security forces based in the district.

Kiunga hosts bases for the Kenya police, army, navy, the paramilitary general security unit and the Kenya Wildlife Service (KWS). When the town experienced eight separate attacks by Somali raiders in 1994, residents reported that the government security forces made a point of not getting involved. The attackers routinely passed the camps housing the army, the police and the KWS en route to the town's commercial centre. During one raid, Kenyan soldiers actually fired flares into the sky signalling their location to insure that the bandits, who kept the town's unarmed civilians under siege until morning, did not attack their compound by mistake.

During the mid-1990s, bandits repeatedly attacked the settlement at Magogoni, leading to its eventual abandonment. Most of the farmers were Bajuni IDPs and Boni who had developed farms with mature cashew trees. The government allocated several thousand hectares of the now fallow Magogoni farmland to a retired head of the Kenyan navy in 1997. The owner then sold 1 500 hectares to the government for a new naval base, and another 4 000 hectares was advertised for sale on the Internet as Ngelani Ranch. These developments reinforce local perceptions that state elites and administrators colluded with the bandits to force the Magogoni community off their land.

The military base established on land formerly farmed by Bajuni cultivators in Magogoni facilitated the harassment of fishermen and travellers – but has yet to prevent the incursions of pirates and illegal trawlers. In 2010, Somali pirates attacked a freighter in Lamu waters. This only set the stage for two high-profile kidnappings of Europeans from Lamu resorts in September and October of 2011. The second incident involved a handicapped French woman who was abducted from her residence on Ras Kitao, an area of Manda Island beachfront across the channel from Shela.

LAND INSECURITY AND THE LAMU SETTLEMENT SCHEMES³⁴

Land in Kenya, as elsewhere in Africa, is the basic foundation of community, economy and social identity; and insecure land and natural resource tenure are at the root of Lamu's

predicament. Lamu's land problems originated with the widespread collapse following the destruction of the Witu Sultanate and the imposition of British rule in 1895. Cultivated land returned to bush, leading the British governor Hardinge to obtain a 'fatwa' from the Sultan in Zanzibar sanctioning the takeover of coastal land as a public utility.

In 1902, the Registration of Documents Act (RDA, Cap 285) was enacted to facilitate registration of documents relating to private land in the area. In 1908 it became necessary to adjudicate land in the ten-mile strip in order to separate private from communal property. The Land Ordinance of 1908 subsequently designated that unused land reverts to the property of the Crown; the Land Titles Act, Cap 282 of 1908 served this purpose.³⁵

The mainland areas of the district were classified as crown land when the region became a British protectorate. The people of Lamu, Faza and Siyu subsequently petitioned to retain 80 000 acres of communal land holdings on the mainland, but this was rejected in 1919.

Those individuals who successfully claimed their land rights were issued with a freehold certificate of ownership or certificate of mortgage. Title deeds issued for the RDA lands did not create new rights to land but only confirmed existing ownership.³⁶ The administration has nevertheless disregarded many of these deeds. Other efforts to secure local land rights, including a memorandum of understanding (MOU) safeguarding coastal peoples' position signed by Jomo Kenyatta at independence, have suffered the same fate. The MOU was never honoured in letter or in spirit.

The Swahili 'minority' appeared resigned to the fundamental shift in power relations; or, as the author of the British commission remarked, if 'the Swahili are understandably proud of the way their culture has assimilated other invaders in the past ... conquering the Arab conquerors of pre-colonial times, their reaction to the challenge of Kenyan independence' was 'uncertain' in comparison.³⁷ A combination of coastal passivity and state hegemony contributed to the 'invasion' scenario coming to pass.

The post-independence lack of resistance to large-scale disenfranchisement of the indigenous population was reinforced by the way in which new settlers from outside the coast benefited from state support for settlement schemes in Lamu. The Mpeketoni scheme, initiated in 1968 to resettle landless people from Central Province, illustrates the latter.

The colonial administration oversaw the demarcation registration of private free-holdings on Lamu and Pate islands, but communal land on the Lamu mainland and in Tana River District, normally administered as trust lands elsewhere in Kenya, remained state land. The government established the Mpeketoni scheme on a large tract of this crown land in 1967 to resettle landless Gikuyu at the same time that a long string of Bajuni settlements between Mokowe and the border of Somalia were reverting to bush due to insecurity.

The Mpeketoni scheme has served as the model for other state schemes in Witu, Hindi and Mokowe. Unlike the Bajuni informal settlements, these schemes are never attacked by bandits. Their residents enjoy legal tenure of their land, while Lamu's indigenous inhabitants on the mainland remain squatters on their own land, eking out a subsistence existence.

The scheme was instituted after the government rounded up unemployed and landless Gikuyu in Nairobi and other towns, and loaded them onto lorries. They were transported

to Lamu and given plots, tools and food rations. Those who chose to remain experienced harsh conditions during the first years but persisted with assistance from the governments of Kenya and Germany. Where multiple problems have characterised schemes elsewhere on the coast, Mpeketoni has thrived. Explanations for the Lake Kenyatta settlement scheme's success include the fact that:

- the settlers had nowhere to go – they had to work hard to survive, or perish;
- the government assisted the settlers with building materials and food;
- beginning in 1980, the German-assisted GTZ settlement programme assisted the project by funding the road network, water, the provision of farm inputs, community mobilisation, extension services and training, and provision of employment of the settlers; and
- settlers received title deeds, which allowed them to seek credit and invest in off-farm enterprises.³⁸

Local farmers in areas outside the scheme have suffered in contrast, and remain vulnerable to chronic insecurity and the invasion of elephants and other wild animals, and continue to occupy land with no formal security of tenure.

By June 1997, the Mpeketoni scheme was fully occupied with 3 480 settlement plots covering an area of 14 224 hectares, with one settler's allocation averaging 10 acres. Ninety-five per cent of the occupants in the Lake Kenyatta Phase I and II, Hindi Magogoni and Hongwe settlement schemes are from Central Province.

The land area of Mpeketoni Division of the District covers 1 429 square kilometres and 39 kilometres of coastline. A major side effect of the schemes is that the second generation (i.e. the sons of the first settlers) are now 25 to 30 years of age, and are establishing new farms outside the schemes. The numbers of new upcountry settlers is constantly increasing due to the in-migration of both relatives and friends of the original settlers and other ethnic groups new to the area – a process abetted by local people selling land to outsiders.

Eighty per cent of the allocations for Lake Kenyatta Phase II were given to the indigenous population, but there is no development on this land due to lack of assistance from the government or GTZ. The comparative neglect of the locals is a primary reason why many cash-starved indigenous owners sell their plots.

Although the 13 coastal schemes have served as the government's main tool for reducing landlessness, they have neither resolved the problem nor improved production. The ambitious Magarini Scheme outside Malindi ended up as a symbol of Miji Kenda poverty. One study revealed that 78 per cent of coastal inhabitants who were questioned see these schemes as doing very little or nothing to resolve the longstanding land conundrum.³⁹ According to Kanyingi, all the coastal settlement schemes had settled only a total of 8 000 coastal 'squatter' households.⁴⁰ In Lamu the schemes are viewed as a governmental vehicle for importing upcountry settlers; in-migration has seen the district population increase by over 18 per cent over the past decade.

The majority of chiefs and councillors in Lamu's most stable and secure division are now people from outside the district. The non-indigenous settlers now occupy about 50 000 acres outside the settlement areas, and this is a source of major tension for the indigenous people of Witu Division and Mkunumbi Location.

The Hindi-Magogoni scheme was started in 1980; Witu Phase I began in 1989 and Witu Phase II in 1993. The average plot size on schemes is four hectares. Buying land for speculation increased in Hindi due to plans to develop a naval base and oil pipeline, and together with repossessing and reallocating plots, helps explain the 50 per cent occupancy rate. There are also many cases of individuals occupying plots after the original indigenous owners' allocations were cancelled due to administrative malfeasance, or after bribes were paid to settlement scheme officers to reallocate the plots to others.

In the case of this scheme, the number of indigenous allottees is low because in some cases they sold the plots after receiving letters of allocation. In other instances, the indigenous owners' allocations were prematurely revoked after they paid a 10 per cent allocation fee. Most of these plots were reallocated to civil servants and state elites, and remain in their possession although much of the land remains under forest cover or undeveloped. Many of the scheme plots have been allocated and reallocated up to six or seven times, indicating that even though Hindi is a state-assisted scheme, development of farms is problematic for most settlers.

The local inhabitants, most of whom are Boni residing on the land since time immemorial, consequently end up cultivating bush plots on state land outside the scheme in order to survive. Kiongoni, Simanzari, Kawthara, Kibiboni and Ndeu are settlements within the schemes that were formerly occupied by these people, mainly Boni. Hindi town was their trading centre. Now there are approximately 700 local farmers in informal settlements on the borders of the scheme. Hindi Prison is located on land formerly settled by Bajun and Swahili owners.

Negative developments over the past decades notwithstanding, Lamu remains faithful to the Swahili 'open society' model of development. Despite all the problems, Lamu people have not resorted to militant opposition, and culturally they remain committed to the open society model. This may be changing as their grievances fail to receive proper recognition on the ground.

A former councillor from Witu explained the various dimensions of the land problem and the negative impact of state schemes.⁴¹ He noted that the local people were not sensitised enough about the settlement schemes. He also said the local people relaxed in developing the settlement knowing that the land was their own. He blamed the settlement officers for being corrupt: they pressurised the local people into developing the settlement plots or face repossession – they had a short time to settle or somebody else would be settled instead and the settlement officer would benefit financially. The Witu people lost about 50 plots through this method of repossession.

He also complained that the ratio of settling people (i.e. 60 per cent local and 40 per cent from outside the district) was not followed. The people from upcountry had the benefit of owning and settling on the land with the help of the same settlement officers who benefited either through repossession or through second allocation to squatters on the vacant plots.

This is a common practice in Hindi and the Lake Kenyatta schemes. The informant concluded by noting that the majority of the settlement officers are people from outside the Lamu District, and as such they have been trying to help their friends and relatives to acquire the land.

Research conducted on the status of land in Lamu by the Development Management Policy Forum reflects two basic premises: (1) Lamu's land problem and its impact on local economy and social welfare transcends issues of land and resource tenure elsewhere in Kenya; and (2) the perception that Lamu is an unproductive district ripe for development by outsiders is fallacious; rather, the Lamu mainland and archipelago were already prosperous when Kenya became independent.⁴² Their contemporary impoverishment is the product of a quieter quasi-legal violence reflecting the intersection of chronic insecurity and legal disenfranchisement.

THE CIVIL SOCIETY RESPONSE

Kenyan ethnic folk models emphasise the stereotype of cultural atavistic coastal peoples, resistant to education and other prerequisites of modern progress. Insofar as local critics also focus on such internal shortcomings, culture does factor in the accelerating crisis of citizenship on the coast, but casting culture, which for centuries acted to foster integration and fuelled the militant Swahili nationalism during the nineteenth century among a range of coastal communities, as a scapegoat actually inverts the issues.⁴³ In any event, the passivity of coastal political culture is largely a product of the coastal's abhorrence of political violence and rational assessment of its consequences.

State-sponsored violence, in contrast, contributes to the chronic insecurity experienced by the Bajuni since independence. The role of the region as a platform for launching the terrorist attacks of 1998 and 2003 has compounded pre-existing security problems dating back to 1963. However, endemic insecurity in the presence of state securitisation policies and other factors reinforcing the marginalisation of coastal minorities are now revising local attitudes towards the state's neo-liberal agenda.

The bitterness generated by the failure to solve issues of coastal land tenure, already a problem at independence, has re-emerged as a driver of a growing secessionist movement on the coast. Poor educational facilities and other social services underpin unequal access to employment. In Lamu, unfavourable government policies and actions undermined the once-dynamic indigenous economy. The perception that securitisation policies discriminate against Muslims exacerbates pre-existing grievances,⁴⁴ while elected leaders on the coast have proved to be conspicuously incapable of prosecuting communal grievances in the national political arena.⁴⁵

Civil society discourse did focus attention on issues of prejudicial governance and rigged development, and the need for systemic reform after the multiparty elections of 1992. Moi's victory at the polls led to public demands for a new constitution that saw civil society emerge at the forefront of a broad-based social movement for constitutional reform. The pressure increased after the incumbent president won a final term of office in 1997. Widespread

support for the movement included the critical participation of pastoralist minorities. The coast in general and Lamu in particular nevertheless remained comparatively inert. Coastal civil society and activist politicians' participation in the minority rights lobby was limited compared to other minority communities, and the local impact was correspondingly minor as a result.

This began to change after the government started laying the groundwork for building the new port in Lamu. A coalition of local NGOs formed a coalition named Save Lamu. Save Lamu has publicised local complaints over the implementation of the port project while working with Natural Justice, a legal organisation based in Cape Town, to document the status of local indigenous communities with a view to using international protocols to protect local livelihoods and rights of access to the resources on which they depend.⁴⁶

For minority communities disillusioned with their position in Kenya, implementation of the new constitution, its blueprint for administrative decentralisation, and provisions for addressing historical injustices on the coast embody the main hope for reversing the inequalities of the independence era. The efforts of local CSOs to resist the government's plans to construct the port, new planned settlements and oil shipment facilities in Lamu may prove to be the turning point in their battle for equitable treatment as citizens of Kenya. Legal advocacy, however, requires large time frames, and little has changed on the ground, the new constitutional dispensation notwithstanding.

THE MARITIME SECTOR AND THE MAGOGONI PORT

Lamu hosts what is arguably sub-Saharan Africa's most dynamic maritime sector. Bajuni fishermen in traditional dhows sail to distant reefs, venturing beyond sight of land. Maritime activities traditionally powered the regional economy and provided many of the cultural themes of northern Swahili society. Prins reported that the maritime sector provided £65 000 of the District's £105 000 total income in 1963, and little has changed since then.⁴⁷ The maritime economy's clear potential for generating foreign exchange and enhancing local livelihoods has remained unrealised due to state neglect and barriers killing off the centuries-old long-distance and regional dhow trade.

The indigenous fishery remained static due to market constraints and the lack of cold storage and processing facilities. During the 1980s, boat builders using their basic hand tools began constructing large 150-ton dhows, twice the size of conventional ocean-going dhows. The pattern of indigenous economic malaise stifled the growth of this industry. During the 1990s, powerful members of the Moi statehouse cut deals with foreign fishing interests that destroyed local marine habitats while plundering the fishing grounds. Plans for the port complex at Magogoni bypass the indigenous maritime sector and will limit fishermen's access to important grounds despite the local population's rich ecological and technological knowledge.

First proposed several decades ago, the government of President Mwai Kibaki elevated the original plan for the port and rail link to Nairobi into the LAPSET mega-project. The port

project is fuelling speculative acquisition of land on the Lamu mainland and in other areas of the hinterland bordering the proposed transport corridor. The stakes are most acute in Lamu, where a gambit to control the Lamu County Council erupted in a violent confrontation that was filmed by a national media outlet and screened on the evening news in 2010.⁴⁸ Politically connected individuals are frustrating a court injunction halting land transfers by using forged letters backdating allotments.⁴⁹

Another injunction to halt the port's construction pending negotiations with the affected communities remains in limbo. The state continues to provide meagre information on the port. The feasibility study was to be tabled and debated in parliament. Instead the government proceeded to advertise tenders for the first three berths before the preliminary draft of the feasibility study was completed. Even officials of key state ministries in Lamu report that they do not know what is going on.⁵⁰

The secrecy shrouding the LAPSSET project and land allocations raises questions about the state and investors' true intentions. Many people in Lamu believe the Magogoni port is a front for elites acquiring land for speculation. Pastoralist communities along the LAPSSET corridor and other areas attracting extractive industries fear that foreign investment and the allocation of tracts of land to large agri-business firms is a recipe for further marginalisation. The prominent role of the Chinese in these capital-intensive developments raises questions about the motives of regional states in respect of Western governments' support for systemic reform, despite signs of a gathering anti-Sino backlash on the ground.⁵¹

The port's construction in Magogoni and the initiation of offshore oil exploration accentuate the political weakness of Lamu's indigenous communities. Lamu's population growth of 17,8 per cent since the year 2000 does not factor in the out-migration of local people. Indigenous Lamu people fear that the influx of upcountry settlers will lead to the loss of their seat in parliament.⁵² Objective assessment of the project's longitudinal impact indicates it will ensure that the ongoing demographic and political trends will complete the replacement of indigenous Muslims with upcountry Kenyans.

A similar situation is unfolding in Tana Delta, where the allocation of large blocks of land to outside investors is exterminating the customary tenure of local producers, and curbing their access to vital natural resources and water. In August of 2012, a series of violent raids in the Tana Delta area (the delta straddles the border of Lamu and Tana River counties) displaced large numbers of Orma and Pokomo inhabitants. The violence recalls the role of insecurity in removing indigenous owners from large areas of Lamu that have ended up in the hands of outsiders.⁵³

Such developments explain indigenous communities' perception that they are still not legitimate citizens of the Republic of Kenya. This crisis of lesser citizenship – distinct from but not unconnected to Ndegwa's dual citizenship problem – explains why Lamu people began to join, albeit silently, inhabitants of other coastal counties supporting the Mombasa Republican Council's (MRC) advocacy for the secession of the former Coast Protectorate from Kenya.⁵⁴

The MRC leadership has consistently claimed it is committed to using non-violent methods to challenge the historical agreements behind the 1963 incorporation of the ten-mile strip into

Kenya in court.⁵⁵ The government responded with force when the MRC attempted to hold several public meetings to publicise their *Pwani si Kenya* ('the Coast is not Kenya') campaign in April and May of 2011.⁵⁶ Sustained persecution of the MRC leadership increased its support across the coast, and more significantly, the support cut across the coast's ethnic, racial and class divisions.⁵⁷ The publicity generated raised the popularity of the secessionist movement to a threshold it never would have achieved on its own.

The political space occupied by the state is shrinking as supranational organisations assume some of its functions from above and regional while subnational actors reclaim degrees of sovereignty from below.⁵⁸ In some cases, the process has led to new states or de facto autonomous territories.⁵⁹ In multicultural settings where political leaders sincerely embrace constitutionalism, including the international protocols safeguarding environmental resources and their indigenous peoples' custodians, democratic reforms act to enhance national unity.⁶⁰

The shift to federalism in Kenya requires redistribution of sovereignty from above. If the objective is to create a legally constituted community of communities based on the country's 48 original districts, Kenya's state elites accustomed to governing within a highly centralised state have consistently shown bad faith.⁶¹ Even after the formal installation of county governance, decision makers continue to retain or control crucial functions of the former provincial administration devolved to the county governments.

On the coast, the MRC have been silenced for the time being, but they have already disrupted *politics as usual*. Kenya's federal project and constitutionally mandated land reforms will determine the MRC and similar movements' future influence. Effective implementation of constitutionally mandated reforms across the national and county continuum remains uncertain at this point in time.

CONCLUSION: THE EXIT OPTION AND KENYA'S REFORM PROCESS

Historically, the Lamu region has experienced periodic disruptions and domination by outside powers. The process of co-evolutionary social integration nevertheless continued and was enriched by the integration of outsiders over the centuries. For decades the coastal population remained non-reactive in the face of endemic human rights abuses and outsiders' preferential access to land, civil service employment and opportunities in the private sector. Sunni 'quietism' bolstered resistance to radical Islamist influences, despite coastal Muslims having disproportionately suffered from the region's insecurity since independence in 1963.

What is occurring now, however, is the result of an increasingly economic yet arguably even more hegemonic form of state sovereignty. Despite the passage of the new constitution and its provisions for redressing historical injustices on the coast, indigenous communities' frustrations are fanning the already volatile situation. The new constitution is the most critical factor inhibiting the release of pent-up anger. The MRC strategy for reversing the inferior status of the coast through legal means, however, rejects constitutionally mandated

measures for rectifying historical injustices. Even so, many sympathisers see secession as more method than goal; other minority communities disenchanted with their status in modern Kenya also understand the MRC agenda in these terms.

While the judicialisation of the Endorois grievances has yielded important standards for redress, one gets the sense that the decision did not specifically address the relationship between the state and the community. In contrast, the wider significance of the MRC movement dovetails with global and regional trends reconfiguring the concept of sovereignty. The secession gambit highlights two pathways – exit and participation. These options should not be seen as incompatible but rather as aspects of a deeper dynamic operating across the Horn of Africa region.⁶² The clash between communal interests and the influx of international capital in other rangeland areas is likely to produce two distinct outcomes over the longer term: (1) radically reformed and de-concentrated systems of state governance; or (2) internal and cross-border conflicts culminating in the reconfiguration of the region's political boundaries.

Cultural extinction is a third potential outcome on the coast of Kenya, and resolution of the issues will to a large degree depend not only on implementation of the new constitution but also upon the Bajuni and Lamu's other indigenous communities' ability to use the principles and protocols of *liberal constitutionalism* to counter the expanding regime of neo-liberal economic hegemony.

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6

Advocacy for indigenous peoples' rights in Africa

Dynamics, methods and mechanisms

George Mukundi Wachira¹ and Tuuli Karjala²

INTRODUCTION

This chapter surveys some of the advocacy practices with which the authors are familiar that are employed by indigenous peoples in Africa to vindicate their human and peoples' rights. The various interventions identified in the chapter – while contributing to the promotion and protection of indigenous peoples' rights – are quite diverse and context specific. Accordingly they are not necessarily best practices but ongoing advocacy initiatives that could be replicated dependent on the issues at hand and circumstances. Additionally the examples cited in the chapter do not comprehensively represent the entire continent, and indeed are biased towards those practices in East, Central and southern Africa with which the authors are more familiar. However, they represent comparable practices that can be found across Africa among indigenous peoples' efforts to promote and protect their rights through advocacy.

The chapter begins by sketching out the limited scope of the application of the terms advocacy for the purposes of the chapter. This is an important exercise in order to avoid being enmeshed in controversial debates about what amounts to advocacy and distinctions, if any, with programming. Indeed, for pragmatic purposes and to get to the point with dispatch it is the authors' considered view that advocacy is part of programming, and vice versa.

After dispensing with the definitional issues, the chapter traces, albeit briefly, the background and history of indigenous peoples advocacy work in Africa. One of the key actors highlighted in that background is the African Commission on Human and Peoples' Rights Working Group of Experts on the Situation of Indigenous Populations/Communities in Africa, whose contribution is heralded continentally for furthering the indigenous peoples' rights regime in Africa. The section also examines advocacy initiatives by members of civil society and indigenous peoples' activists at the United Nations.

The third section is a brief survey of progress made on the continent at domestic level relative to improving the situation of human rights of indigenous peoples in Africa. Such

progress is measured in terms of legislative and policy developments as well as institutional arrangements for the protection and promotion of indigenous peoples' rights by states.

The fourth section examines past and ongoing advocacy initiatives by civil society and indigenous peoples' activists in Africa. The chapter identifies initiatives that have contributed to the promotion and protection of indigenous peoples' rights in Africa. Some of these initiatives are in the realm of land, natural resources and property rights; gender equality; culture and language rights; access to justice; media; and capacity building and training.

ADVOCACY ON INDIGENOUS PEOPLES' RIGHTS IN AFRICA

There is no global consensus on the definition of the term 'advocacy'. In fact, as Reid argues, 'there is no agreement on which activities constitute advocacy, and no one source gives a full account of the many kinds of activities and strategies that groups use to leverage influence in the policy process'.³ However, various authors have attempted to define the scope of advocacy. Hopkins, for instance, defines the term narrowly as 'the act of pleading against a cause, as well as supporting or recommending a position'. Hopkins's definition is similar to that of lobbying, as he further describes advocacy as 'addressing legislators with a view of influencing their votes'.⁴

Other authors, such as Reid, take a much broader approach than Hopkins, defining 'advocacy' to include organisational building and programme work advocacy and 'action' advocacy.⁵ Whereas the 'organisational building and programme work advocacy' includes activities such as the building of political resources, organisational policymaking and internal education activities,⁶ 'action advocacy' is an umbrella term for a wider range of activities. These include legislative advocacy such as lobbying; grassroots advocacy; public education; electoral advocacy; legal advocacy such as litigation; administrative advocacy; corporate advocacy; media advocacy and international advocacy.⁷ Hammer, Rooney and Warren equally identify with that broad definition of advocacy, stating that it includes not only 'speaking on behalf of others', but also 'advocacy based on insights gained from research' and which aims to 'mobilise community of knowledge'.⁸

Reid has also examined the *raison d'être* of advocacy activities. According to Reid, non-profit organisations are 'intermediaries between citizens and institutions of government and business'.⁹ Furthermore, through their advocacy work, non-profit organisations 'contribute to democratic governance by representing civic concerns in policy making by enlarging opportunities for citizen participation in public decisions, and by creating accountability between government and citizens'.¹⁰ Hammer et al. concur with Reid, arguing that through campaigns, advocacy and lobbying, civil society organisations (CSOs) 'play a large and growing role in policy formations at national and global levels'.¹¹ With regard to lobbying and communication about social objectives as issues, Reid further argues that non-profit organisations 'provide representation for collective interests and values in civil society'.¹²

UNICEF has also defined what it terms an 'Advocacy for People's Power' (APP) model. According to UNICEF, advocacy has three principal objectives, which consist of policy change, systematic change and democratic change. This type of advocacy 'goes far beyond changing one policy into changing the power structure and how ordinary people perceive of their own ability to influence the decision making processes'.¹³ UNICEF's APP model also defines the different outcomes expected of the advocacy activities. The policy change category deals with a specific problem or issue 'through introducing or amending a piece of legislation or a policy'.¹⁴ UNICEF's advocacy guide, however, states that this type of advocacy takes place only between elites and decision makers.¹⁵

With regard to grassroots, marginalised and disadvantaged groups such as indigenous peoples, the application of this model can result in the feeling that 'they have no power in themselves, and rather, their power is in the good people who sympathize with them and want to help out as part of doing good deeds in the best assumption'.¹⁶

Conversely, the systematic change advocacy model 'goes beyond focusing on a single policy or a piece of legislation' and addresses the system, in which institutions make public decisions and policies.¹⁷ According to the UNICEF advocacy guide, this outcome is achieved through 'establishing a better [system] involving transparent decision-making processes that are streamlined'.¹⁸

Finally, the democratic change model concentrates on ordinary citizens and especially on marginalised and disadvantaged groups. According to the UNICEF advocacy guide, under this model, marginalised and disadvantaged groups 'are aware of their rights and their power to participate, and actually use this power to effectively participate in the decision making processes at all levels'.¹⁹ The UNICEF advocacy guide names this model as the most important to achieve, but also acknowledges that it is 'the most elusive to capture'.²⁰

This chapter will use the term 'advocacy' in its broad meaning as defined by Reid and UNICEF when examining the possible best practices in advocacy on indigenous peoples' rights.

BACKGROUND OF INDIGENOUS PEOPLES' RIGHTS ADVOCACY IN AFRICA

The recognition of indigenous peoples' rights in Africa has been an arduous and controversy-ridden process, in which advocacy by various actors has played critical roles. As Bojosi argues, the concept of indigenous peoples 'was not a consequence of popular or mass and conscious self-identification by some ethnic groups in Africa' but rather a 'long enduring external mission to have the concept of indigenous people in international law applied to certain pre-determined peoples in Africa'.²¹ It has thus been largely defined and redefined by a variety of conscious advocacy initiatives, mainly by indigenous peoples themselves with support from international and national NGOs and human rights experts.

As Ndahinda argues elsewhere in this volume, international advocacy work relative to African indigenous peoples' rights has often been traced to a presentation made by Mr Parkipuny, head of an NGO representing the Maasai people in Tanzania, to the United

Nations Working Group of Indigenous Populations (UNWGIP) in 1989.²² This was a pioneering act, as no African person had before then ever made a statement to the United Nations as a representative of indigenous people.²³ In his presentation, Mr Parkipuny highlighted the prejudices and violations against 'peoples with cultures that are distinctly different from those of the mainstream of national populations' that took place in African states.²⁴ This statement 'demarcated and fossilised the discursive contours of ... the African indigenous discourse'.²⁵

In the late 1980s and throughout the 1990s, African indigenous peoples' representatives, civil society actors and activists working on indigenous peoples issues spurred on by support from international and national NGOs argued for the applicability of the concept of indigenous peoples in Africa.²⁶ This marked the beginning of several years of sustained advocacy and intense lobbying by African indigenous peoples towards the use of the term 'indigenous people' in the African context, which had thus far been rejected by African states.

In 1993, one of the international organisations at the forefront of support to African indigenous peoples – IWGIA – facilitated a seminal conference on indigenous people in Africa, which marked the starting point of a 'coherent continental movement of indigenous peoples'.²⁷ The advocacy campaign for recognition and protection of indigenous peoples in Africa received a boost with the involvement of the then chair of the South African Human Rights Commission, Professor Barney Pityana, who also doubled as a member of the African Commission on Human and Peoples' Rights who 'took the lead on the continent to address the issue of indigenous peoples' rights'.²⁸

A massive leap in the advocacy work on indigenous peoples' rights in Africa was made in 1999, when another continental conference on indigenous peoples' rights was held in Arusha, Tanzania. The Arusha conference was a result of the efforts of indigenous peoples in Africa with support from IWGIA and the Pastoralists Indigenous Non-governmental Organisations (PINGO) forum.²⁹ The conference aimed to 'contribute to the empowerment of indigenous peoples in Africa' by providing a forum where African 'indigenous representatives ... could meet, exchange experiences and make forward looking strategies'.³⁰ Eighty people, including Commissioner Pityana of the African Commission and 50 representatives of 30 African indigenous peoples' organisations, attended the conference.³¹

One of the key resolutions of the Arusha conference was a recommendation 'that the African Commission on Human and Peoples' Rights should be encouraged to address the human rights situation of indigenous peoples in Africa'.³² The resolution under paragraph 21(3) requested the African Commission of Human and Peoples' Rights ('African Commission') to establish a 'working group to consider all aspects of the rights of indigenous peoples in Africa and to promote consideration of the matter by African States'.³³

Initially, the African Commission rejected the request, as it 'did not find the term "indigenous peoples" applicable to African conditions'.³⁴ However, after intense and unrelenting lobbying from indigenous peoples in Africa with support from Commissioner Pityana, in November 2000, at the 28th ordinary session of the African Commission, the Resolution on the Rights of Indigenous Populations/Communities was adopted.³⁵ This provided for the formation of the

African Commission's Working Group of Experts on the Situation of Indigenous Populations/Communities in Africa ('Working Group'), which was established by the African Commission in its 35th ordinary session in November 2003. Its establishment was, however, not without controversy and in fact faced some resistance from some of the commissioners, ostensibly on the recurrent argument that all Africans are indigenous and accordingly there was no need to establish a working group for a specific group.³⁶

However, over the years the African Commission has universally embraced the concept and the work of the Working Group, which has in fact become a model for other working groups at the Commission. Overall, the establishment of the Working Group is today seen as the culmination of the indigenous peoples' struggle for recognition and protection of their fundamental human and peoples' rights despite continued constraints and challenges, especially at national level.³⁷ It is therefore useful to briefly highlight in the next section some of the advocacy initiatives by the Working Group and indigenous peoples at that platform that have contributed to the promotion and protection of their rights.

AFRICAN COMMISSION WORKING GROUP OF EXPERTS ON THE SITUATION OF INDIGENOUS POPULATIONS/COMMUNITIES IN AFRICA

The establishment of the African Commission's Working Group of Experts on the Situation of Indigenous Populations/Communities in Africa is 'heralded as recognition of the existence of particular marginalised groups in Africa, identifying themselves as indigenous peoples whose rights are protected by the African Charter'.³⁸ Indeed, through the establishment of the Working Group, the African Commission 'adopted its first ever policy paper recognizing that the concept of 'indigenous peoples' has relevance in Africa'.³⁹ It has been argued that the Working Group created space for real dialogue to begin on indigenous peoples' plight and situation in Africa.⁴⁰

The establishment of the Working Group is significant, not only due to its application of the term 'indigenous peoples' in the African context but also for the various functions it performs. The Working Group has been progressively pivotal in the protection and promotion of indigenous peoples' rights in Africa, as well as in raising the profile of the African Commission.⁴¹ Furthermore, according to Dr Naomi Kipuri, a member of the Working Group, the African Commission was able to tackle this important human rights issue on the continent, despite initial resistance by some member states.⁴²

With regard to advocacy activities by indigenous peoples, the establishment of the Working Group ushered in an opportunity structure for civil society and various indigenous peoples' actors to further indigenous peoples' rights in Africa. The Working Group receives technical and financial support from external donors and actors such as IWGIA.⁴³ However, such a situation of dependence on external actors is not sustainable and there is therefore an urgent need for the African Union to provide support to the Working Group if the issue is to remain on the agenda of the African Commission and African states until indigenous peoples realise their fundamental human rights.

In addition to the formation of the Working Group, the African Commission's protective function has furthered indigenous peoples' rights in the form of consideration of complaints alleging human rights violations.⁴⁴ The African Commission has interpreted article 56 of the African Charter on Human and Peoples' Rights liberally and progressively such that those taking cases to the Commission need not be, or know, the victim. Consequently, this has provided an important avenue for indigenous rights advocacy. The generous interpretation by the African Commission has 'enabled NGOs and activists – including indigenous peoples' organisations such as the Centre for Minority Rights and Development (CEMIRIDE) – to take up cases of human rights violations on the continent that would otherwise not have reached the Commission'.⁴⁵ The liberal interpretation is crucial, given the limited capacity by most minority peoples to take cases to the African Commission because of lack of resources, illiteracy and limited awareness of the mechanism.⁴⁶

Furthermore, the African Commission grants observer status to NGOs.⁴⁷ This has further facilitated advocacy activities by indigenous peoples as they are allowed into the Africa Commission's ordinary sessions as observers.⁴⁸ NGOs prepare and submit draft resolutions through the NGO forums that precede the ordinary sessions of African Commission to consider, and thus contribute and propose means and strategies to solve human rights issues on the continent.⁴⁹

Since 2003, the NGO forum has called for the African Commission to address human rights issues faced by indigenous peoples.⁵⁰ Indigenous peoples' representatives and organisations such as IWGIA have been at the forefront of these advocacy initiatives, which have 'elicited interest through raising awareness and support of participation of indigenous peoples at the African Commission's sessions'.⁵¹

Indigenous peoples' organisations and their representatives have also continued to engage and participate in the ordinary sessions of the African Commission.⁵² Participation of the indigenous representatives 'is central to encouraging and assisting the ACHPR to uphold its focus on indigenous peoples' rights when examining periodic reports on the human rights situation of African states'.⁵³ Indigenous peoples have also been involved in the writing of shadow reports of the African Commission's ordinary sessions and 'assist the Commissioners in asking substantiated and critical questions on indigenous peoples during dialogues with States and in the drafting of the concluding observations'.⁵⁴

KEY OUTCOMES OF ADVOCACY INITIATIVES BY AFRICAN INDIGENOUS PEOPLES

Since the pioneering advocacy work by indigenous peoples in Africa from the late 1980s, and the establishment of the African Commission's Working Group, various events furthering the rights of the indigenous people in Africa have taken place. During the UN 'Decade of the World's Indigenous People' from 1995 to 2004, Africa witnessed some improvement in the situation of indigenous peoples as a result of various advocacy activities. In Morocco, for instance, the state 'reversed its long-standing position of

Arabism and unbanned the Amazigh language'.⁵⁵ In Kenya, the pastoralist indigenous peoples' political organising had a 'substantial role in bringing about political change and the re-affirmation of democracy'.⁵⁶

During the last decade, the indigenous peoples' movement gained further foothold around the continent. This was demonstrated by, for example, the nomadic indigenous people in Mauritania and Cameroon organising grassroots civil society initiatives.⁵⁷ In Mali and Niger, the Tuareg and other indigenous peoples groups built networks of CSOs, which have 'redefined sustainable economic options for the Sahara'.⁵⁸ Progress was also marked in the Great Lakes region, where the Batwa indigenous people built 'national networks for advocacy and development'.⁵⁹

In southern Africa, the Working Group of Indigenous Minorities in Southern Africa (WIMSA), a regional network coordinating and representing the interests of San peoples in southern Africa, was formed in 1996.⁶⁰ Amongst other advocacy work, WIMSA has been successful in litigation advocacy as well as in assisting an indigenous San group to secure their control over natural resources in the largest conservation area in Namibia.⁶¹

In eastern Africa, in Rwanda and Burundi, the Batwa indigenous organisations have been 'in active dialogue with government over representation of their peoples and participation in the structures of governance'.⁶² Through their advocacy work, the Batwa organisations are involved in 'reshaping the nature of democracy and edging into the dialogue on conservation, forests and natural resource management'.⁶³ This has prompted observers to argue that Communauté des Autochtones Rwandais (CAURWA), an NGO working for the Rwandan Batwa indigenous peoples through setting up a national network of field workers,⁶⁴ is 'a best-practice model for community organizing and empowerment'.⁶⁵

However, repression and retrogressive developments have also emerged as a result of advocacy work by some indigenous organisations in Africa. In 2005, for instance, the Rwandan government withdrew its support from CAURWA, accusing it of 'promoting ethnicity and undermining national unity'.⁶⁶ The Rwandan government annulled CAURWA's legal status, and consequently 'blocked CAURWA's ability to raise funds and help vulnerable indigenous rural people'.⁶⁷

Contemporary advocacy work on indigenous peoples' rights can broadly be divided into different thematic areas. These areas include land, natural resources and property rights, gender equality, culture and language rights, education, health, labour rights and employment, as well as access to justice.

ADVOCACY FOR LAND, NATURAL RESOURCES AND PROPERTY RIGHTS

One of the main threats faced by the African indigenous peoples is the dispossession of their traditional lands, caused by 'unfavourable state policies, logging, conservation initiatives, tourism and commercial hunting activities, encroachment of agriculture and individualization of land tenure'.⁶⁸ Advocacy work on indigenous peoples' land rights is one of the most important focus points of indigenous peoples on the continent.

In March 2011, during the first East Africa Regional Dialogue on Minority Community Rights, land rights of indigenous peoples and human rights of minority communities were the main topics of discussion.⁶⁹ In particular, the landmark Endorois case of 2010 was discussed, and participants, including representatives of indigenous peoples and minority communities from the East African region as well as government and civil society organisations from Uganda and Kenya, were informed of the details and outcome of the case.⁷⁰ Participants at the consultation agreed to 'continue developing and expanding regional approaches that seek to link indigenous peoples and minorities with state agencies in an effort to work towards an increased respect for the rights of indigenous peoples and minorities in the East African Region'.⁷¹

The East African Regional Dialogue on Minority Community Rights was the result of the advocacy work of five civil society actors including the United Organisation for Batwa Development in Uganda, the Forest Peoples Programme (FPP), Minority Rights Group International, Institute for Law & Environmental Governance, Uganda Land Alliance and Advocates Coalition for Development and Environment.

Advocacy work on indigenous peoples' land rights in Kenya by the MPIDO is also a case in point. The MPIDO's land rights programme focuses on 'lobbying for policy reforms, capacity building of local communities, and legal action to challenge land dispossession'.⁷² MPIDO's advocacy activities concentrate on the use of the Kenyan Land Policy and the new constitution to 'develop models for concretely securing and protecting land and natural resource rights for Maasai and other pastoralists in Kenya'.⁷³ MPIDO's land rights programme was evaluated at the end of 2009, with the external evaluation reports concluding that 'the programme had achieved substantial results and needed to be continued and expanded'.⁷⁴

Further advocacy work on indigenous peoples' land rights in Kenya is done by the Endorois Welfare Council (EWC). This concentrates on strengthening the capacity of the Endorois community to 'effectively negotiate with the Government of Kenya with regard to the implementation of the Africa Commission landmark ruling on restitution of land and natural resource rights to the Endorois people'.⁷⁵ The Endorois decision by the African Commissions on Human and Peoples' Rights found the Kenyan government to be in violation of the indigenous peoples' human rights when it displaced the Endorois people from their ancestral lands in the 1970s.⁷⁶ The African Commission ordered the Kenyan government 'to restore the Endorois' rights to their ancestral lands and to compensate them'.⁷⁷

The Centre for Minority Rights and Development (CEMIRIDE) leads advocacy initiatives with support from Minority Rights Group International and WITNESS in supporting litigation and advocacy on indigenous peoples' issues at the African Commission. The three organisations, for instance, 'provided video corroboration as part of their evidence package'.⁷⁸ This was the first time that media advocacy was used before the African Commission. The significance of the ruling has been hailed 'as the first to determine who indigenous peoples in Africa are, and what their rights to land are'.⁷⁹

Buoyed by the Endorois ruling, the Ogiek Peoples' Development Programme (OPDP) is presently pursuing a legal petition on the forced evictions of Ogiek people from their ancestral forest home before the African Commission.⁸⁰ During the 11th Extra-Ordinary Session, the African Commission decided to refer the Ogiek Petition to the African Court on Human and Peoples Rights for hearing and determination, marking the first time that an indigenous rights claim was to be adjudicated by the Arusha-based court.⁸¹ Korir Sing' Oei, who was the lead counsel in the Endorois case, is assisting the Ogiek with the litigation.

Tanzania's indigenous peoples continue to face forced evictions in the Loliondo area of northern Tanzania. The PINGO forum continues to engage in advocacy work to map out legal and advocacy strategies in order to assist the indigenous victims of the forced evictions and to prevent further ones from taking place in the future.⁸² The advocacy consists mainly in exploring legal responses to the evictions in collaboration with Tanzanian and Kenyan lawyers.⁸³ Civil society actors in Tanzania are also involved in advocacy work concerning the forced evictions in Tanzania, by 'raising awareness of the situation and encouraging a strong response' amongst international institutions in Tanzania.⁸⁴

In Burundi, Unissons-Nous pour la Promotion des Batwa (UNIPROBA), an organisation representing the Batwa, conducted a survey in 2006 to record the land situation of indigenous people in the Bujumbura Rural, Bururi, Cibitoke, Gitega, Ngozi and Ruyigi provinces of Burundi.⁸⁵ The survey found that 'almost all the Batwa in the six provinces surveyed were either totally landless or had less than 1 000 m² of land for a whole household'.⁸⁶ UNIPROBA's land rights advocacy programme aims to 'secure land rights for the landless Batwa people via the national land distribution process'.⁸⁷ The distribution project is currently being implemented 'in collaboration with the government and local authorities' and has led to the 'implementation of Batwa representation in national policy and governance structures on land matters'.⁸⁸

The Indigenous Peoples of Africa Co-ordinating Committee (IPACC) is also active in advocating for the indigenous peoples' rights concerning land and natural resources in various African states. In 2007, IPACC held various meeting with the Burundi Minister of Environment and Land Management, and members of the Burundian government, Senate and National Assembly on environment and indigenous peoples' access to natural resources.⁸⁹ IPACC is also engaged in training and policy dialogue in Burundi with regard to issues of deforestation, protection of biodiversity, resource rights and climate change. Furthermore, in 2008 IPACC was involved in a project in eastern DRC through which the indigenous people are 'attempting to negotiate their rights' with regard to the Kahuzi Biega National Park.⁹⁰ The project includes workshops, in which job creation for the indigenous peoples is addressed.⁹¹

In southern Africa, WIMSA is also active in the land rights advocacy with regard to the NtjaJaqna Conservancy, which the Namibian Ministry of Lands and Resettlement has planned to transform into small-scale farms.⁹² As a result of vigorous advocacy and awareness raising, in 2008, 79 per cent of the area's inhabitants stated their opposition to the Ministry's plan, as reported by WIMSA.⁹³

ADVOCACY FOR GENDER EQUALITY

Indigenous women in Africa continue to be subjected to double discrimination due to 'belonging to marginalised/suppressed communities' and 'suffering from traditional discriminatory practices'.⁹⁴ Despite the African Commission's 'heightened attention to indigenous peoples' rights' in the past decade, due to advocacy efforts by indigenous peoples, indigenous women's rights remain of serious concern.⁹⁵ The situation has admittedly changed significantly in recent years, due to the 'concentrated efforts' of various indigenous peoples and women's organisations, which have resulted in the African Commission 'increased consideration' of indigenous women's rights.⁹⁶

Indigenous women's rights and empowerment are cross-cutting issues which indigenous activists and organisations seek to 'integrate ... into key activities, such as in the land and natural resource rights and capacity building/awareness raising projects'.⁹⁷

The main human rights violations affecting indigenous women in Africa include various forms of violence such as female genital mutilation, traditional harmful practices to women (such as early marriage), constraints to access of land rights, limited access to education, and inadequate decision-making power and positions.⁹⁸ Advocacy activities in this regard include initiatives to promote gender equality through the mainstreaming of gender issues to all land rights, human rights and empowerment projects.⁹⁹

Indigenous communities in Africa have also conducted consultations and data gathering with a view to strategising on interventions that protect their rights. For instance, NGOs in Cameroon and Central Africa have collected information about the situation of indigenous women in Cameroon's forests.¹⁰⁰ The information has, for instance, been used in a supplementary report to the African Commission regarding Cameroon's periodic review as well as in a report on the situation of indigenous women and people in the country.¹⁰¹ In March 2010, 11 indigenous women of Cameroon had an opportunity to 'voice their concerns at a National Forum on Forests'.¹⁰²

In January 2011, CED, the Réseau Recherches Actions Concertées Pygmées (RACOPY) and the FPP integrated the issues raised by indigenous women during the 2010 consultations and at the National Forum on Forests in their supplementary report to the African Commission.¹⁰³ The concerns highlighted by the indigenous women included

the multiple forms of discrimination faced by indigenous women in society; the violation of their reproductive rights; indigenous women's increasing lack of access to health care, water, and traditional resources; and the obstacles to conducting their traditional and income-generating activities, which contribute to food insecurity, greater marginalisation, and extreme poverty.¹⁰⁴

Perhaps due to those advocacy efforts, the African Commission's concluding observations of the periodic review of Cameroon included various recommendations with regard to the rights of indigenous peoples.¹⁰⁵ Many of the recommendations 'draw on the information outlined in the supplementary report submitted to the Commission'.¹⁰⁶ Included in the Commission's

observations was the recommendation to the government of Cameroon to 'harmonize the national legislation with the regional and international standards on the rights of indigenous populations/communities' and 'adopt appropriate legislation for the protection of the rights of indigenous populations'.¹⁰⁷ With regard to gender equality, the Commission, for the first time in its Concluding Observations, specifically recommended that the government of Cameroon 'take special measures to guarantee the protection and implementation of indigenous women's rights due to their extreme vulnerability and the discrimination to which they are subjected'.¹⁰⁸

In 2011, indigenous peoples, in collaboration with the Special Rapporteur on the Rights of Women in Africa, Commissioner Soyata Maïga, launched a toolkit on 'Indigenous women's rights and the African human rights system' at the 49th Ordinary Session of the African Commission in April–May 2011.¹⁰⁹ The toolkit was designed to 'provide NGOs and indigenous women organisations in Africa with a helpful resource to guide their effective use of the various African human rights mechanisms'.¹¹⁰ The toolkit was developed by the FPP and partner organisations in collaboration with the Special Rapporteur's office, and was elaborated upon in consultation with 'local, regional, and international partners working with indigenous women and indigenous peoples' organisations'.¹¹¹

Since 2010, indigenous women's rights have increasingly been integrated into the land and natural resource rights projects in Africa.¹¹² One of the advocacy activities which took place on the continent was a workshop on *Gender and land tenure in Africa* in July 2011.¹¹³ The workshop aimed to create a 'discussion forum on gender, rights to land, and forest resources in Africa' and to 'clarify the applicable legal framework and protection mechanisms created to secure the rights to land and resources'.¹¹⁴ In addition, the workshop was used as a platform 'to share information on land and forest reforms that are taking place in several African countries'.¹¹⁵

In Kenya, the MPIDO has been involved in gender and land advocacy initiatives through a process whereby women organise themselves around land issues and are registered as the co-owners of land.¹¹⁶ These types of programmes empowering indigenous women in land matters are 'an effective way of combating land dispossession, as women tend to be stronger guardians of ancestral lands'.¹¹⁷

One of the most significant developments with regard to indigenous women's rights took place at the 49th Ordinary Session of the African Commission in April–May 2011 in Banjul, the Gambia. The African Commission adopted a Resolution on the Protection of the Rights of Indigenous Women in Africa.¹¹⁸ The Resolution 'marks the first time that the African Commission specifically addresses indigenous women's rights'.¹¹⁹ Furthermore, the Resolution notes 'the persistence of violence and various forms of discrimination and marginalization faced by indigenous women in all areas of society'.¹²⁰

The Resolution further acknowledges the 'crucial role played by indigenous women in the protection and preservation of natural resources and in protection, development and transmission of indigenous knowledge and culture'.¹²¹ Finally, the African Commission 'urges State Parties to collect disaggregated data on the general situation of indigenous women' and 'to pay special attention to the status of women in their countries and to adopt laws, policies, and specific programs to promote and protect all their human rights'.¹²²

ADVOCACY FOR CULTURE AND LANGUAGE RIGHTS

With regard to the protection and promotion of the indigenous peoples' culture, the disappearance of the passing of knowledge from one indigenous generation to another is one of the main issues of concern in East Africa.¹²³ With the support of IPACC, the Yaaku activists of the Mukogodo Forest in Kenya are involved in 'language revival work and mobilisation of their community around indigenous peoples' rights'.¹²⁴ The indigenous Yaaku community of Kenya is encouraged to 'collectively express their indigenous knowledge of their cultural and natural landscape, as well as to develop a common approach to protecting their rights and managing their resources sustainably'.¹²⁵ Indigenous hunter-gatherer peoples from East Africa have also engaged in cultural exercises where 'elders teach young people about the cultural and natural landscape of the Mau Forest'.¹²⁶

In southern Africa, WIMSA is involved in advocacy for indigenous languages. It has, for instance, facilitated and held writing workshops such as the ones held for the !Kung and !Khwedom in 2007–2008 in Namibia.¹²⁷ Advocacy programmes focus on the prevention of the heritage loss of indigenous cultures with support for Namibia's National Museum's exhibition on the San people; the indigenous Kuru Dance Festival in D'Kar, Botswana; and a cultural exchange programme between the San people from NyaeNyae, NtjaJaqna and West Caprivi, as well as the !Khwattu cultural centre in the Western Cape in South Africa.¹²⁸

ADVOCACY FOR EDUCATION

With regard to advocacy for education, WIMSA has been instrumental in ensuring indigenous traditional languages and appropriate education are adopted in Namibia. WIMSA has, for instance, given financial and administrative support in Namibia to indigenous secondary and tertiary students to continue their studies.¹²⁹

Advocacy for early childhood development in Namibia has also been done in collaboration with the United Nations Educational, Scientific and Cultural Organisation (UNESCO) and the Bernhard van Leer Foundation.¹³⁰ WIMSA's advocacy efforts consisted mainly of 'community mobilisation, training of early childhood development caregivers, as well as donating grants and donations of equipment to kindergartens'.¹³¹

ADVOCACY FOR ACCESS TO JUSTICE/INTELLECTUAL PROPERTY RIGHTS

Biopiracy is one of the most prominent emerging infringements of indigenous peoples' rights in Africa. Often, commercialisation of plants, of which indigenous people hold traditional knowledge, takes place without consultation with indigenous communities and without benefit sharing. Various indigenous peoples NGOs have been involved in advocacy initiatives to protect the intellectual rights of indigenous peoples.

In 2003, WIMSA, together with the South African San Institute (SASI), were successful in their advocacy efforts of enforcing the San peoples' intellectual property right to the *hoodia*

gordonii plant, which has been used for thousands of years by the San people as an appetite suppressant.¹³² In 2001, however, it emerged that the South African Council for Scientific and Industrial Research (CSIR) had patented 'P57', the active ingredient of the plant, and down-licensed the rights of commercial exploitation to a British pharmaceutical company, Phytopharm.¹³³ The San people had not been consulted about the process, nor was there any agreement on sharing the benefits of the commercialisation of the plant.¹³⁴

WIMSA and SASI entered into negotiations with the CSIR, which resulted in the CSIR recognising the intellectual property rights of the San people to *hoodia gordonii* in a 'historic benefit-sharing agreement' in March 2003.¹³⁵ According to this agreement, the CSIR would pay the San people '8% of all "milestone" payments it received from its licensee' and '6% of all royalties that it would receive of the commercial profits of the "P57"'.¹³⁶ To ensure the 'effective stewardship of the monetary benefits' CSIR and WIMSA jointly established a 'Hoodia Trust'.¹³⁷

WIMSA has also been engaged in a negotiation process regarding the Botswanan government's eviction of San people from their traditional territories and the dispossession of land in the Central Kalahari Game Reserve in Botswana in 2002.¹³⁸ In 2006, Botswana's High Court found the eviction by the government to be unlawful. Additionally, the court found that government's denial of the San's right to enter the reserve and to hunt and gather there was unlawful and unconstitutional.¹³⁹ However, the ruling has not settled the wider dispute around rights of the San people, as the decision has been interpreted as applying strictly to the 189 plaintiffs of the case.¹⁴⁰ Consequently, in 2006, WIMSA, along with other NGOs, established the Central Kalahari Game Reserve coalition to seek 'a negotiated settlement of the Central Kalahari Game Reserve issue'.¹⁴¹

WIMSA has additionally been providing a paralegal service in Outjo, Namibia, which includes assistance with labour issues, Motor Vehicle Association claims and welfare grants.¹⁴² Various training workshops have also been held aimed at informing indigenous peoples about their intellectual property rights.¹⁴³ The NGO has also formulated a media/research contract, designed to 'manage and regulate all uses of heritage and culture', in order to prevent further violations of the intellectual property rights of the San people.¹⁴⁴

In East Africa, advocacy work on the protection of indigenous peoples' intellectual property rights is exemplified by IPACCS support of the Maasai intellectual property rights.¹⁴⁵ Cases of biopiracy and copyright piracy 'are increasing in Eastern Africa, without free, prior and informed consent of the knowledge holders'.¹⁴⁶ In Kenya, examples of such piracy include the patenting of the genes of the red Maasai sheep abroad as well as indiscriminate copyrighting of the traditional songs, stories, poems and artwork of indigenous communities.¹⁴⁷

MEDIA ADVOCACY

WITNESS and the Centre for Minority Rights and Development (CEMIRIDE) are good examples of the use of documentaries and film to advance indigenous peoples' rights. The two NGOs collaborated in the production of a film documenting the claims of the Endorois to the land around Lake Bogoria and the impact of the eviction on the community.¹⁴⁸ The film

was created in two workshops organised by WITNESS and CEMIRIDE, and was aimed at 'bringing the voices of the affected Endorois into the courtroom'.¹⁴⁹ The film was also used as part of a broader campaign to raise awareness of the Endorois both in Kenya as well as in international forums.¹⁵⁰

The African Commission's Working Group with support from IWGIA has equally used film and social media to promote indigenous peoples rights.¹⁵¹ The Working Group produced a film aimed at raising awareness of the Bagyeli, the Mbororo, the Endorois and the Ogiek indigenous communities' human rights situations. The film is 'expected to be a powerful tool for raising awareness of indigenous peoples' rights and human rights situation in Africa'.¹⁵² IWGIA is also supporting a Rwandan Batwa organisation, Communauté des Potiers du Rwanda (COPORWA) in its efforts to create awareness around the situation of the Batwa people in Rwanda through a media project.¹⁵³

CAPACITY BUILDING AND ADVOCACY THROUGH TRAINING

Indigenous peoples' organisations in Africa have also sought to strengthen the capacity of their members and communities through training. IPACC has, for instance, facilitated and held training courses on the issues of deforestation, protection of biodiversity, resource rights and climate change in Burundi as well as training courses on the UN Declaration on the Rights of Indigenous Peoples and the African Charter for indigenous activists in Brazzaville, Congo.¹⁵⁴

In eastern Africa, similar training courses on the United Nations indigenous rights instruments have been held among Ethiopian, Kenyan, Tanzanian and Ugandan activists.¹⁵⁵ The courses were aimed at, among others, preparing indigenous peoples activists on engaging African diplomats in New York and their countries towards the adoption of the UN Declaration on the Rights of Indigenous Peoples.¹⁵⁶ Maasai Women for Education and Economic Development (MAWEED) also held workshops on indigenous peoples and policy issues in Kenya in preparation for the December 2007 Kenyan presidential elections.¹⁵⁷

In southern Africa, regional workshops on the assessment and certification of indigenous peoples' tracking skills have been held in collaboration with Cybertracker Conservation, WWF Namibia, the NyaeNyae Conservancy, the NtjaJaqna Conservancy, and Mount Burgess Mining.¹⁵⁸ In 2007, two follow-up workshops on the certification and formalisation of tracking were held in Botswana by IPACC and the Trust for Okavango Culture and Development Initiative (TOCaDI).¹⁵⁹

Furthermore, in 2005 IPACC set up a map-training centre in Shakawe, Ngamiland. The aim of the project was to map the territories of the San people as well as their knowledge of wild foods.¹⁶⁰ Overall, IPACC's long-term goals for the indigenous communities in southern Africa include 'income-generation projects in areas such as traditional crafts and eco-tourism, as well as training for employment in the mainstream economy'.¹⁶¹

In West Africa, indigenous peoples' organisations such as the Tunfa Association, Mboscuda and Tin Hinan, in collaboration with a regional advocacy network Tasghalt, have held workshops for indigenous nomadic peoples of the Sahara and Sahel.¹⁶² The workshops

focused on the issues of 'good governance, the Millennium Development Goals, strengthening of civil society capacity and building up regional advocacy alliances and capacity' and were attended by 40 associations from Niger, Burkina Faso, Mali, Mauritania, southern Algeria, Chad and northern Cameroon.¹⁶³

CONCLUSION

From the foregoing, it is evident that advocacy initiatives by indigenous peoples in Africa to promote and protect their fundamental human rights are diverse, and tailored to respond to specific issues of concern by the communities. The African Commission's Working Group on Indigenous Communities/Populations has been an important rallying platform that has given impetus to the indigenous peoples' rights movement to ventilate and articulate their rights and issues of concern. Equally useful have been the international and national NGOs that continue to support the advocacy initiatives by indigenous communities through the provision of technical and financial resources.

It is also clear that there is no single advocacy initiative that can be said to be the most effective in ensuring that indigenous peoples realise their fundamental rights. Rather, it is imperative to employ multiple strategies and initiatives to advance indigenous peoples' rights that may range from litigation; media advocacy; targeted research and dissemination; training and capacity strengthening; awareness raising to public education; and legislative, policy change and development.

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A challenging nexus

Transitional justice and indigenous peoples in Africa

Laura A. Young

INTRODUCTION

Despite challenges of marginalisation, lack of capacity and lack of recognition, indigenous peoples across Africa are fighting for a platform and a voice in governmental transitions on the continent. This chapter explores an important and largely ignored nexus – that between transitional justice in Africa and indigenous peoples in countries undergoing transition. This chapter uses comparative case studies to examine how transitional justice mechanisms and governments have responded to the demands of indigenous groups to play a role in the transitional justice processes that impact on them. Ultimately, the cases of the Rwandan, South African, Nigerian, Kenyan and Moroccan transitional justice processes highlight the political forces that control the manner in which indigenous people find their voice and platform, as well as the ways in which states' historical modes of interaction with indigenous groups can transfer through the transitional phase. The nexus is an important one because the claims of communities who self-identify as indigenous generally go to the very heart of African governance challenges today – demands for self-determination at local level, positive recognition of cultural and other forms of diversity, legal pluralism, and land and natural resource rights are at the centre of the indigenous rights movement in Africa and are critical destabilising issues in African governance.

Despite this, the interaction between indigenous peoples' rights and transitional justice in African has been mostly ignored, in transitional justice processes and in the scholarly consideration of transitional justice generally. Through identification of comparative cases, this chapter argues for more robust consideration of how indigenous rights frameworks and transitional justice processes can interact at all three of the practitioner, policy and scholarly levels.

TRANSITIONAL JUSTICE IN THE AFRICAN CONTEXT

Tools of transitional justice include specialised prosecutions, truth seeking, amnesty, systems reform, vetting, lustration, memorials, official apologies and reparations.¹ In the past decades, transitional justice has moved from the 'exception to the norm to become a paradigm of rule of law'.² The recently solidified normative power of transitional justice is reflected in its adoption as a dominant analytical framework amongst intergovernmental institutions, specifically the United Nations (UN). In October 2011, UN Secretary General Ban Ki Moon presented a report to the Security Council on rule of law and transitional justice in conflict and post-conflict societies. The report underlined the importance of transitional justice as 'essential to understanding the international community's efforts to enhance human rights, protect persons from fear and want, address property disputes, encourage economic development, promote accountable governance and peacefully resolve conflict, [serving] both to define our goals and to determine our methods'.³ The report operationally defined transitional justice as

... comprising the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) ...⁴

Transitional justice is a victim-centred field of practice and inquiry. The rights of victims, including the right to truth, the right to justice, the right to reparation and the right to guarantees of non-repetition, form the guiding principles of transitional justice efforts. Transitional justice operates almost exclusively in societies moving⁵ from a legacy of conflict or widespread human rights abuses, to an ostensibly newly democratic era based firmly on respect for human rights and the rule of law. This may take place through coups d'état, popular revolution, peace accords or negotiated political transitions.

In the African context, transitional justice in the past three decades has emerged as a fully-fledged movement mirroring the field's global dominance. Truth commissions and post-transition prosecutions have swept across Africa from Morocco, to Sierra Leone, to South Africa, to Kenya.⁶ Africa, however controversially, is the subject of all of the prosecutions to date at the International Criminal Court. Vetting exercises, lustration of political actors and constitutional/institutional reform have been increasingly common in multiple transitions across Africa, from South Africa to Liberia to Rwanda.

In keeping with international trends, transitional justice is moving towards becoming a normative frame for rule of law on the continent. The African Union, led by a South African civil society organisation, has embarked on a process of developing a continent-wide policy on transitional justice.⁷ Discussions on policy development so far have recognised the major role that Africa plays in contributing to the global development of transitional justice. Moreover, it is proposed that an African transitional justice policy should focus on the

promotion of institutional reforms, dealing with inequality through economic transformation and restoration of trust in key institutions of government.⁸

TRANSITIONAL JUSTICE AND INDIGENOUS PEOPLES

The normative framework for indigenous peoples' rights, including both international and regional treaties and declarations, has similarly gained prominence across the continent. Treaties at regional level, such as the African Charter on Human and Peoples' Rights, along with its associated protocols on children's and women's rights, have in recent years been effectively used to advance the rights of indigenous groups. The recent decision of the African Commission on Human and Peoples' Rights (ACHPR) in the Endorois case is perhaps the most powerful example. The decision adopted legal standards and reasoning from other human rights systems while solidifying an African jurisprudence on indigenous rights.

In the Endorois case, the ACHPR ultimately adopted criteria for identifying indigenous peoples, a highly contentious issue across the continent. These criteria include 'the occupation and use of a specific territory; the voluntary perpetuation of cultural distinctiveness; self-identification as a distinct collectivity, as well as recognition by other groups; an experience of subjugation, marginalisation, dispossession, exclusion or discrimination'.⁹ Indigenous groups in Africa specifically include hunter-gatherers, pastoralists and other groups for which 'survival of their particular way of life depends on access and rights to their traditional land and the natural resources thereon'.¹⁰ Given its endorsement by the preeminent African regional human rights body and its incorporation of international standards related to the topic, this definition is the one adopted for the discussion in this chapter.

Despite potentially important synergies, there is virtually no policy discussion of the link between transitional justice and indigenous peoples' rights in Africa. Although the above-mentioned meeting of the AU Commission on an African transitional justice policy noted that a 'framework should address social, cultural and economic justice issues including reparation for victims of human rights violations and international crimes'¹¹ as well as 'inclusiveness and equity',¹² there was no mention of a potential nexus with indigenous peoples' rights at the session.¹³ This is in contrast to an in-depth discussion of synergies between transitional justice and gender justice, for instance, at the same meeting. The contrast reflects the marginalisation of indigenous peoples' rights across the international human rights field, a state of affairs that has developed due to the perceived tension between indigenous rights and the power of the state as a primary actor in human rights discourses. This tension has been particularly pronounced in Africa, where post-colonial state-consolidation exercises have left little room for the recognition or participation of indigenous communities.

Equally, there is very little scholarly literature on the topic of indigenous rights and transitional justice in Africa.¹⁴ This is not the case related to transitional justice and indigenous peoples on other continents, such as in the Americas and Australia. In those contexts, literature addresses how transitional justice mechanisms have impacted on the

rights of indigenous peoples and how indigenous peoples themselves view transitional justice as a tool for recognition and redress.¹⁵ There also exists literature focused on related issues, such as transitional justice and development, and transitional justice and land rights.¹⁶ While each of these thematic areas is relevant, they fail to examine the unique issues confronting African indigenous peoples in transitional justice processes.

Moreover, the literature that is emerging related to indigenous peoples and transitional justice, especially in Africa, is generally produced externally to indigenous communities. For instance, a 2011 conference hosted by the International Centre on Transitional Justice focused on production of a practitioner's guide to truth commissions, and indigenous peoples' rights did not include representatives from any indigenous community from Africa.¹⁷ This chapter does little to rectify the situation given that, although the author works with indigenous groups in Africa and consulted them in relation to their experiences for this report, the chapter nevertheless remains an observer's report. The issue is raised primarily in an effort to highlight the need to promote participatory policy discussion and scholarly examination of these issues.

The dearth of literature is perhaps unsurprising given the controversy around the very notion of indigenouness in Africa. Identifying case examples in which indigenous peoples were excluded or participated in transitional justice processes first demands a definition of indigenouness, something that has been lacking until very recently in the African context. The African Commission's Endorois decision provides an important platform from which to begin examination of the nexus of indigenouness with other key issues on the continent.

CASE STUDIES OF INDIGENOUS PEOPLES AND TRANSITIONAL JUSTICE PROCESSES

With the emergence of additional clarity in defining indigenouness, this chapter identifies case studies of several transitional justice processes in nations where there are self-identified indigenous populations. The transitional justice processes discussed below in Rwanda, South Africa, Nigeria, Kenya and Morocco all included truth commissions, as well as other transitional justice mechanisms. Truth commissions form an important aspect of transitional justice for indigenous groups because they have an overtly narrative function, generally re-examining history and identities. Truth commissions can contribute to affirming new social values and realigning multiple social identities 'through a deliberate egalitarian approach that affords acknowledgement and dignity to all'.¹⁸ The case examples below demonstrate ways in which states have or have not managed to adopt such an egalitarian approach.

The cases are not organised chronologically or regionally, but are ordered to reflect the spectrum of how indigenous identities have formed part of the narrative landscape of African transitions, from being ignored and denied (Rwanda and South Africa), to being engaged as marginalised – but not explicitly indigenous – peoples (Nigeria and Kenya), to leading the transitional process and gaining explicit recognition of key cultural and linguistic rights (Morocco).

BATWA IN RWANDA'S TRANSITION

The nexus of transitional justice and indigenous rights in Rwanda centres on the Rwandan genocide of 1994. After the violent murder of almost a million people based on overt ethnic targeting, Rwanda embarked on a transitional justice process that has been characterised by an unrelenting attempt to erase ethnicity-based identity.

Of the three main ethnic communities in Rwanda (Bahutu, Batutsi and Batwa), Batwa comprise less than one per cent of Rwanda's population.¹⁹ Marginalised for centuries, these traditionally forest-dwelling hunter-gatherers have largely been left out of the dominant Hutu-Tutsi narrative of the genocide in Rwanda. As the Organization of African Unity report on the genocide described, '[t]he [Hutu and Tutsi] groups virtually shared just one conviction: that the Twa were at the bottom of the Rwandan hierarchy'.²⁰ Despite their marginalisation, Batwa were significantly affected by the violence in Rwanda. Depending on their perceived social background and their political affiliation, Batwa were targeted in the genocide along with Batutsi and many Bahutu. In the pre-genocide days of Batutsi rule, some Batwa had been affiliated with the Batutsi as a result of their roles at the court.²¹ Although this was an extreme minority – the majority of Batwa were not politically active or affiliated – Batwa as a group suffered as a result of the affiliation of a few. There are no official estimates of the number of Batwa who died in the genocide, but some have estimated that as many as 30 per cent of the population was killed; this is in comparison to an estimated 18 per cent of the Rwandan population overall.²² Some report Batwa being used as human shields by Bahutu and Batutsi during the genocide;²³ others note that some Batwa also participated in the genocide, either because they were forced to do so or because they joined the *Interahamwe* killing squads.²⁴

Rwanda has embarked on multiple transitional justice initiatives, including an international criminal tribunal, the local *gacaca* justice mechanism, a truth and reconciliation commission which is now a permanent body, and extensive memorialisation through museums and memorial sites around the country. Like many transitional societies, Rwanda promulgated a new constitution in 2003. These mechanisms were designed to create a new national narrative in Rwanda. The dominant narrative created out of Rwanda's transition led to an official policy of strict non-discrimination, but in practice went to the extreme of absolute denial of differential identity based on ethnicity. This policy is enshrined in Rwanda's transitional constitution. Article 9 states that the fundamental principles of the Rwandan nation include 'fighting the ideology of genocide and all its manifestations; – eradication of ethnic, regional and other divisions and promotion of national unity'.²⁵ Rwanda's post-genocide constitution does contain measures to support the development of historically marginalised groups, but this category focuses on women and the disabled, excluding the Twa from specific mention.²⁶

The Rwandan narrative of ethnic denial is in direct contrast to the recommendations of an Organization of African Unity panel, which noted that:

Rwanda is unlikely ever to be an ethnic-free nation, but this need not be a cause for despair. Diversity, properly appreciated, strengthens a society, and unity in diversity is the mark of a strong

nation. We believe Rwandans should acknowledge ethnicity for what it is: legitimate, value-free distinctions between groups of people who share and accept a larger identity in common. There can be Rwandan Hutu and Rwandan Tutsi and Rwanda Twa without ascribing superior or inferior value implications to those groupings.²⁷

To date, however, Rwanda's transition has moved along the opposite path.

For the Batwa, state policy has reinforced their marginalisation and invisibility. Shortly after the genocide, in 1995, the Rwandan Batwa formed an advocacy group called Community of Indigenous Rwandans (CAURWA). However, this ethnic-identity-based activism was unacceptable in the post-conflict Rwandan narrative.²⁸ The government would not register CAURWA because of its use of the word 'indigenous' in its name, and its funding and ability to operate as a legitimate NGO were repeatedly threatened. As a result, CAURWA was forced to become COPORWA – *Communauté des Potiers Rwandais* (Organisation of Rwandese Potters) in 2007.²⁹ A NEPAD African Peer Review Mechanism report for Rwanda found that the government's actions with respect to the Batwa were based on 'a policy of assimilation ... [and] a desire to obliterate distinctive identities and to integrate all into some mainstream socio-economic fabric of the country'.³⁰

Apart from the legal framework, other transitional justice mechanisms also marginalised the Batwa as actors in Rwanda's transition. Batwa expressed strong concerns about how the local *gacaca* prosecutorial mechanism, put in place to deal with genocide perpetrators, would protect minority rights. The community expressed concerns about there being no Batwa-elected judges for the *gacaca* and the fact that it would be hard to find Batwa witnesses for trials, given the community's extremely small numbers.³¹ The choice of *gacaca* as a 'traditional' Rwandan justice mechanism also raises issues of whose tradition is employed in the post-conflict justice landscape. Scholars suggest that in reality the present day *gacaca* has little substantive relation to any traditional system that may have existed in Rwanda because it has been so substantially appropriated by the state.³² It is unclear whether it ever was traditionally used in Batwa communities.

The National Unity and Reconciliation Commission (NURC),³³ which started as a transitional, temporary truth-seeking body, has since been made a permanent government body. The work of this commission also reflects the Catch-22 for Batwa in Rwanda's transition. In 2010, the NURC published findings from its reconciliation barometer, a nationwide survey using a representative sample to assess Rwandans' feelings about transitional justice, specifically reconciliation. One particular survey item is of keen interest, in that it asked participants to identify who should be the primary parties involved in reconciliation efforts in the country. While 'Hutu and Tutsi ethnic groups' was one of the responses, Batwa as parties to the reconciliation effort were not specifically identified in any of the response options.³⁴ Batwa are mentioned in a later survey item, specifically the agree/disagree question: 'I want my children to think of themselves as Rwandans, rather than Hutu, Twa or Tutsis'.³⁵

The Rwandan transitional machinery is designed, like all transitional justice processes, to create a new national narrative – one that reflects state consolidation and which adopts

dominant-elite perspectives on how identity should be expressed. Despite the positive policy gains related to non-discrimination during the transition in Rwanda, the Batwa are no longer able to advocate for their rights based on their indigenous identity. The Batwa doubtless continue to suffer discrimination despite the normative environment. One Rwandan scholar notes that the term 'Twa' is still used as a derogatory appellation in Rwandan society.³⁶ The NURC survey bears this out, with 41 per cent of 'historically marginalised' respondents agreeing that '[a]lthough ethnic discrimination is banned in Rwanda, it still occurs' and a third of marginalised respondents agreeing that 'Rwandans still judge each other on the basis of ethnic stereotypes'.³⁷

As these results show, Rwandan Batwa clearly are not discriminated against because they are 'potters' but they are unable to advocate as Batwa against ethnic-based discrimination given the post-conflict legal regime. As one scholar notes, Rwanda's 'clumsy attempt at social engineering is in fact more likely to exacerbate tensions, as Rwandans are aware of each other's ascribed identities and can observe inequalities in access to resources and power, but do not have the right to talk about it'.³⁸ In effect, Rwanda's transitional process has made the entire notion of indigenouness illegal, depriving the Batwa of the ability to employ the international framework of indigenous rights.

INDIGENOUS PEOPLES IN SOUTH AFRICA'S TRANSITION

Perhaps the most famous and well-researched transition in Africa is the South African transition from apartheid to democracy. The transition was accompanied by multiple transitional justice measures, including some prosecutions, a new constitution, institutional reforms and a truth commission that operated from 1995 to 2002 (the latter four years being primarily amnesty application hearings). Despite the multitude of literature related to transitional justice in South Africa, especially the truth commission, there is hardly a mention of South Africa's first inhabitants, the indigenous Khoe and San.³⁹

The Khoe and San, including their subgroups, reside primarily in the Northern and Western Cape regions of South Africa and in total number fewer than 400 000 people.⁴⁰ Some San subgroups still rely in part on hunting and gathering, but all indigenous groups have had to adopt other livelihoods. During the colonial period, the Khoe and San experienced massive dispossession of their ancestral hunting and grazing lands. Under apartheid, the Khoe and San were arbitrarily assigned to the 'coloured' category of racial identity,⁴¹ effectively excluding them from their identity as black Africans.

The South African Truth and Reconciliation Commission (TRC) was one of the country's most visible and powerful mechanisms of transition. While often viewed as a model truth commission by other African nations embarking on a transitional justice process, the South African TRC was accompanied by multiple controversies, compromises and unmet expectations.

As with other truth commissions, the 'terms and categories the TRC adopted served to organise, summon and exclude particular identities'.⁴² The TRC used the term 'indigenous' in its report as a counterpoint to the category of white settlers, setting up a dichotomous narrative

between state 'authorities' and an 'indigenous liberation movement'.⁴³ This dichotomy appropriated indigenous identity away from the Khoe and San in the service of other political interests in the post-apartheid era, specifically countering the white-settler narrative that Bantu Africans were migrants to South Africa. Moreover, the TRC interpreted its mandate in a manner that excluded many types of human rights violations that disproportionately affect indigenous peoples. The TRC stated that despite expectations to the contrary the TRC would not investigate 'forced removals of people from their land' and thus victims of those types of violations would be excluded from reparations.⁴⁴ 'As a result, although framed in the terms of a wider reconciliation in a racially divided society, the TRC rarely addressed racial identities directly.'⁴⁵

Indeed, the UN Special Rapporteur on Indigenous Peoples noted in a 2005 report that indigenous peoples' representatives in South Africa complained 'that they were not included in the negotiations leading to the democratic transition, nor in the new national constitution nor in the Truth and Reconciliation process'.⁴⁶ An indigenous rights advocate from the Indigenous Peoples of Africa Coordinating Committee noted that because there was no official government policy recognising indigenous peoples in South Africa at the time, there was no interest from the TRC (a government entity) in addressing the issues of indigenous South Africans.⁴⁷ This may also have translated into a lack of interest on the part of some South African NGOs working on transitional justice issues. A major South African victims' organisation focused on engagement with the TRC process, the Khulumani Support Group, set up seven branch offices across South Africa. However, offices were not located in the Northern Cape or Mpumalanga, where significant Khoe and San populations reside.⁴⁸

In the post-transition era, institutional reform has led to some gains for indigenous communities in South Africa, but these have been uneven. For instance, a few communities working in cooperation with legal assistance NGOs have had their land returned under the 1994 Restitution of Land Rights Act.⁴⁹ Although this legislation has been effectively used by certain communities, the law was not designed specifically to assist indigenous peoples.

Constitutional provisions establishing a framework for the recognition of traditional governance structures, as well as a National House of Traditional Leaders, have not led to the gains one might expect. There are no indigenous representatives in the National House of Traditional Leaders, and indigenous groups continue to push for official recognition of their traditional governance structures.⁵⁰ Moreover, although indigenous languages are mentioned in the post-apartheid Constitution, they are not granted official status despite 11 others (including nine Bantu languages) being granted such status.⁵¹ This has led to indigenous peoples not being reflected in official census statistics because the census collects data based on language category.⁵²

In 2004, the South African cabinet produced a memorandum recognising the Khoe and San as indigenous people in South Africa who had been marginalised throughout the nation's history.⁵³ Today, although the Khoe and San are understood to be the indigenous peoples of South Africa, policy development and programmatic progress as a result of this understanding remain to be seen.

THE Ogoni IN NIGERIA'S OPUTA PANEL

Nigeria's ethno-political geography and history are complex and extremely contested. As in many African countries, the notion of minorities, indigenes and marginalisation are highly politicised. There are multiple groups in Nigeria who self-identify as indigenous peoples.⁵⁴ This section will focus on the interaction of the self-identified indigenous Ogoni people with the truth commission process in Nigeria,⁵⁵ primarily because this group has the most information available about it. It is important to note, however, that many other communities in Nigeria could likely be identified as indigenous groups, but have not yet claimed that label for themselves.⁵⁶ Moreover, the truth commission itself noted, and its report reflects the fact, that multiple groups in Nigeria have experienced abuses in similar measure to the Ogoni but have not benefited in the same way from international and media attention. Nevertheless, the interaction of the Ogoni with the truth commission in Nigeria is an important example because of the way in which the commission addressed group rights and natural resource extraction issues often left aside in other transitional justice processes.

The truth commission in Nigeria was established after the country emerged from a long period of military dictatorship and transitioned to civilian democratic rule. President Obasanjo appointed the Human Rights Violations Investigation Commission in 1999. It became known as the Oputa Panel after its chairperson, former Supreme Court Justice Chukwudifu A. Oputa. It operated for slightly less than three years, until 2002. The Oputa Panel, unlike some other transitional justice mechanisms, has been relatively ignored by scholars. There may be multiple reasons for this, including the fact that the Oputa Panel operated at the same time as the South African TRC, because severe violations were ongoing – especially in Rivers State related to the Ogoni situation – during the panel's work,⁵⁷ because the commission's work was hampered by lack of resources and because the panel's report was never officially published by the government. In 2005, however, a Nigerian NGO unofficially published the report in its entirety. Despite the ambiguity about the Oputa Panel caused by the government's failure to publish the report, its work is nevertheless worthy of examination – it included much more than its report, specifically public hearings across Nigeria and reconciliation meetings with groups, as well as work on the situation in Ogoniland.

Unlike the other truth commissions and transitional processes addressed here, Nigeria's Oputa Panel confronted key issues for indigenous peoples including socio-economic rights, land issues and problems of marginalisation. Justice Oputa, in his introduction to the final report, wrote:

... the various ethno-communal groups in the country, including the major ones, complain of marginalization in the scheme of things. I cannot address the issue of citizenship and marginalization in this Foreword other than to observe that they are central to the consideration of human rights as group, ethno-cultural, ethno-religious or collective rights as well as to the foundations of federalism in the country ... our national experience with federalism shows that the problem of marginalization is at the bottom of minority ethnic group fears of the curtailment or violation of substantive human

rights – the right to self-determination, the right to the promotion of their cultural rights, and their citizenship rights, especially the right to equitable participation in the cultural, economic and political life of the country.⁵⁸

This statement goes to the very heart of why minority and indigenous peoples' rights are of critical importance in African governance. Moreover, it is a direct challenge to the prevailing norms in many African countries, where minority concerns are suppressed and ignored in the name of national unity and development progress. As described above, other transitional justice processes have adopted narratives that ignore and suppress minority identities, but Nigeria's commission chose an alternative path.

Despite this ultimate recognition, the Oputa Panel did not begin its work with any specific plan to engage with indigenous groups.⁵⁹ The panel received communications and statements from more than 10 000 individuals and groups across Nigeria – it chose 150 key cases to be heard in public sessions, including several Ogoni petitions. The panel's work coincided with substantial advocacy on behalf of the Ogoni on a number of fronts. In 1990, the Ogoni had formed MOSOP, an advocacy organisation that promulgated the Ogoni Bill of Rights which called for a halt to environmental degradation and the control of natural resources on Ogoni lands by the Ogoni. The Ogoni's struggle became internationalised. In 1996 the Ogoni filed a communication at the African Commission on Human and Peoples' Rights alleging violations of their rights under articles 2 (non-discrimination), 4 (personal integrity), 14 (property), 16 (health), 18(1) (family), 21 (peoples' rights to dispose of their natural resources) and 24 (peoples' right to the environment) – the petition was not decided until 2001. After years of protests and violent clashes that spread to other ethnic minorities in the Niger Delta, in 1999, before the panel commenced, President Obasanjo released the bodies of Ogoni rights activist Ken Saro-Wiwa and eight others who had been hanged after a show trial and buried in secret graves.

The Oputa Panel did not explicitly deal with the Ogoni as indigenous peoples; rather, they addressed the claims in terms of marginalised minorities within the Nigerian Federalist system. Indeed, one of the commissioners who has worked extensively on the Ogoni issue over the years, Bishop Michael Kukah,⁶⁰ made it clear when asked about participation of indigenous peoples in the Oputa Panel process that 'I do not think we have indigenous people in Nigeria. We have a constitutional democracy and all groups have some levels of representation'.⁶¹ In the end, this difference may be semantic, but in a process that creates a national narrative of historical truths, semantic differences can be extremely powerful.⁶²

In terms of outcomes for the Ogoni, whether described as indigenous, marginalised or minority, the Oputa Panel created a platform for recognition of their concerns. Ogoni petitions were heard in public sessions in Port Harcourt, in the Niger Delta. The panel found:

- a) That irrespective of the denials by the alleged perpetrators, there are clear indications that the rights of people were violated in various ways in Ogoni Land.
- b) That communal as against individual compensation is a more viable option towards achieving lasting peace in Ogoni land

- c) That the land use Act of 1978 which divest people of the ownership of their land [and] hence their natural endowment is a bad law, which can be rectified through deliberate Government policy that will ensure that people directly affected, benefit one way or the other from the natural endowment explored from their communities.
- d) That monetary and logistic support rendered to armed forces personnel's guarding oil installations by oil company's [sic] is a source of concern to their host communities.
- e) That gas flaring is still continuing in the Niger Delta of Nigeria even when it has been stopped in other part of the world
- f) That the reconciliatory effort initiated by the Commission between the parties need to be encouraged at the state and the Federal levels of Government.⁶³

The findings by the Oputa Panel related to human rights violations in relation to natural resource extraction are an important recognition of the rights of peoples to control over their natural resources and wealth. This finding was echoed by the African Commission on Human and Peoples' Rights in their decision regarding *Social and Economic Rights Action Centre & the Centre for Economic and Social Rights v Nigeria*.

The Nigerian example highlights the way in which indigenous peoples can take advantage of spaces created by transitional justice mechanisms to enhance their advocacy efforts. The Nigerian examples also demonstrate that true power to enforce change lies in political processes that can swiftly undermine human rights progress. In Nigeria the Oputa Panel report was buried, and the exploitation of resources and degradation of the environment in Ogoniland continue today.⁶⁴

KENYAN INDIGENOUS COMMUNITIES AND THE TRUTH, JUSTICE AND RECONCILIATION COMMISSION

The root causes of the crisis in Kenya are complex, but marginalisation of communities on the basis of ethnicity has been a major contributor. As one report noted, 'the state pursued deliberate policies of marginalisation and exclusion and perpetrated injustices with particular reference to land distribution and access to economic resources.'⁶⁵ It took an outbreak of the most severe election-related violence the country has known in 2007, and subsequent sustained pressure from Kenyan civil society and the international community, to finally force the political establishment to change tack.

The post-election violence in 2007–2008 continued a pattern in which the Kenyan state orchestrated inter-ethnic violence, often directed against communities that supported opposition political parties.⁶⁶ To bring an end to the violence and political stalemate, former United Nations Secretary General Kofi Annan led the National Dialogue and Reconciliation effort that created a power-sharing government. The mediation agenda also included an item that came to be known as 'Agenda 4', which focused on a slate of programmes such as constitutional review, strengthening the rule of law, addressing key development issues and creating mechanisms to focus on national unity and cohesion. The Agenda 4 process laid the groundwork for transitional justice in Kenya. Agenda 4 required the establishment of

commissions to investigate the post-electoral crisis, including the Commission on Investigation of Post Election Violence (CIPEV), which has led to investigations by the International Criminal Court (ICC) in Kenya. Agenda 4 started the process of constitutional review, which ultimately led to the 2010 adoption of a constitution that includes provisions for electoral, judicial and police reforms. Finally, Agenda 4 also required the establishment of a truth commission to uncover and confront Kenya's history of human rights abuses.

The transitional justice mechanisms operating in Kenya include a new constitution that has mandated an extensive slate of institutional reforms, a truth commission, memorialisation efforts and an international criminal court prosecution. The Truth, Justice and Reconciliation Commission (TJRC) provided the most explicit forum for the expression of indigenous issues. This is not to say that other mechanisms are not having an impact on indigenous communities, but the space available for expression of indigenous as opposed to other forms of identity is not as evident.

The mandate of the Kenyan TJRC included a requirement that the commission 'inquire into and establish the reality or otherwise of perceived economic marginalisation of communities and make recommendations on how to address the marginalisation'.⁶⁷ Moreover, the TJRC was mandated to 'inquire into the root causes of ethnic tensions and make recommendations on the promotion of healing, reconciliation and co-existence among ethnic communities'.⁶⁸ The TJRC interpreted this mandate in a way that has allowed for significant interaction with indigenous groups across Kenya.

Kenya has multiple ethnic communities that self-identify as indigenous peoples, including traditional hunter-gatherer communities such as the Ogiek and Sengwer, multiple pastoralist groups of which the Maasai, Turkana, Samburu and Endorois are only a few, and fisher peoples such as the Ilchamus.⁶⁹ Many of these groups have their own advocacy and development organisations which work closely with other Nairobi-based civil society groups as well as the Kenya National Commission on Human Rights to advance the rights of minorities within Kenya. This nationwide network of organisations has played a significant part in Kenya's transitional justice processes.

The TJRC began operating in July 2009 and began public hearings in April 2011. The final report of the TJRC was released in May 2013. According to TJRC staff, the commission gathered more than 40 000 statements and memoranda from individuals and groups. This is a large number relative to other commissions, the most successful of which have generally gathered 20 000 or so statements. Also, unlike many other commissions, the TJRC reported that more than 60 per cent of the statements and memos it received related to land claims. Many of these memoranda came from indigenous peoples and other marginalised minority groups. The TJRC also hired members of indigenous communities to act as statement takers in their home regions, and has appointed a member of the indigenous Ilchamus community to lead its outreach efforts.

In its public hearings, the TJRC heard a substantial number of grievances from indigenous peoples. Leaders of indigenous groups appeared on behalf of their communities to present their claims relative to ancestral lands, to discuss the roots of conflicts with neighbouring

communities, and to highlight human rights violations by the state and corporations. For example, in public hearings Naivasha Maasai leaders asked the TJRC to make findings relative to destructive geothermal energy extraction on ancestral Maasai lands. Testimony was partly in English and partly in Maasai, and the issues were framed in terms that specifically described the Maasai's indigenous rights claims. The elected chair of the community asked the hearing audience: 'Does anyone know the meaning of the name of Naivasha? It is a Maasai name. We have been here since God created the world.'⁷⁰ They specifically distinguished themselves from other ethnic communities who also testified to marginalisation but who were not the 'indigenous' inhabitants of the land in pre-colonial days.

In other parts of Kenya as well, indigenous communities framed their claims to their ancestral lands and pointed a finger at the post-colonial state for not addressing historical land injustices. A Kalenjin elder at TJRC hearings in Eldoret testified that:

[w]hen the [others] came they came with their names. But this land is alive; it knows its name and its owners. When someone else brings a name, the soil says, Who is this? What is your totem? What is your clan? The new names for the land create conflict in the spiritual realm. We respectfully ask that the names of the land be restored.⁷¹

The TJRC also held women's forums in each of its hearing locations. In Lodwar, for example, the administrative centre of the Turkana district which is home to the Turkana pastoralists, women spoke about double discrimination and common issues for indigenous women, including forced and early marriage, polygamy, land grabbing upon divorce or widowhood, access to health care and education and other basic socio-economic needs. Importantly, however, Turkana women also shared many stories of resistance to oppression of women in their community. Women were able to give their testimony in Swahili, English or Turkana, and simultaneous translation was available.

Although the TJRC heard from these communities in an effort to fulfil its mandate to examine marginalisation, the communities themselves framed their own narrative in terms of indigenous rights and their special relationship with their ancestral lands. Communities appeared at TJRC hearings in their indigenous dress, and testified in their own languages. Through its public hearings, the TJRC offered a platform for a demonstration of the existence of indigenous communities in Kenya.

The final report of the TJRC also provides an important basis for addressing indigenous peoples' concerns. The report contains an entire chapter focused on minority groups, indigenous peoples and gross violations of human rights.⁷² The TJRC also made a slate of findings and recommendations specifically related to minorities and indigenous peoples. The TJRC found 'that throughout the mandate period the state failed to recognise the existence, unique culture and contributions of many minority and indigenous communities in Kenya'.⁷³ The commission also found that Kenya 'has failed to implement important judicial decisions related to promoting and protecting the rights of minority groups, such as the Ilchamus and Endorois decisions. This trend has consistently undermined minority groups' confidence in the

ability of the Kenyan justice system to deliver substantive equality'.⁷⁴ The TJRC recommended, among other things, that the government ratify ILO 169 and apologise to minorities and indigenous peoples for violations, that the law reform commission carry out a review of laws to examine *de facto* and *de jure* discrimination, and that the government create a plan on data collection related to indigenous peoples.⁷⁵

In contrast to other transitional justice efforts that have ignored and denied the identities of indigenous groups, the transitional justice process in Kenya, as exemplified by the TJRC, has had no choice but to examine indigenous issues as they have been laid, literally, at the commission's feet. Much of the engagement of indigenous communities with the TJRC was due to deliberate efforts both on the part of the TJRC and certain civil society groups to encourage and support participation. Despite this, it remains to be seen whether the TJRC will in the end produce any value for Kenya's indigenous peoples apart from a forum to air their grievances. There have been multiple problems with the TJRC process in Kenya, most beyond the scope of discussion in this chapter. Problems of leadership, lack of capacity, credibility and integrity, and ultimately political manipulation of the release of the final TJRC report all may combine to undermine any potential gains that could have come from the TJRC for indigenous groups, and others, in Kenya.

Despite the TJRC's important recommendations related to indigenous rights, implementation of those recommendations remains a major challenge. This has indeed been the case with all truth commission processes globally. Kenya's failure to implement recommendations from the African Commission related to the indigenous Endorois community, after several years, does not provide a starting point of confidence.

THE IMAZIGHEN IN MOROCCO'S SLOW TRANSITION

While much of North Africa has been caught up in the Arab Spring, Morocco has been slowly transitioning for more than a decade, with the ascension of King Mohamed VI to the throne in 1999.⁷⁶ This slow transition has been driven in substantial part by the Imazighen (Berbers), the indigenous inhabitants of the Maghreb. The Imazighen primarily reside in Morocco, Algeria and Tunisia, but populations stretch as far as Egypt and Nigeria. The number of Imazighen in Morocco is contested, with figures ranging from 40 to 70 per cent of the population.⁷⁷ Imazighen speak their own language (Tamazight) and have traditionally lived a semi-nomadic existence.

Across North Africa, the colonial system used divisions between Arab and Berber populations as part of a divide-and-rule strategy. 'The policy of containment of Berbers (confining their territorial space), while suppressing the Islamic judicial system, drove a wedge between the traditional Arab elites and the Berber peasants.'⁷⁸ In the post-colonial era, Arab-dominated governments pursued a policy of Arabisation. 'The quest for a national and regional identity emphasized Arab while marginalizing Amazigh throughout North Africa, suppressing the Berber identity for fear of breakaway movements.'⁷⁹

After independence from France, Morocco entered a period known as the Years of Lead, during which opposition to the Arab monarchy was systematically crushed using overt violence,

oppression, co-optation and other tactics to retain power.⁸⁰ The period was characterised by enforced disappearances, extrajudicial executions, arbitrary detention, torture, and other state-sponsored violence. Slow reforms began after the brutality of King Hassan II's rule was exposed and he took action to address the damage to his international image. After King Hassan's death, what could be termed an actual transition began. King Mohamed VI in the first year of his rule established a panel to assess and grant reparations to victims of disappearances and detention. As a result of this panel's work, more than 3 500 Moroccans received reparations for state-sponsored human rights violations, totalling nearly US\$100 million.⁸¹

The panel's establishment also spurred the establishment of a civil society group called the Moroccan Forum for Truth and Justice (*Forum Vérité et Justice* or FVJ). One of the group's leaders was a Berber and former political dissident, Driss Benzekri. The group, in concert with other human rights organisations, led the push for a truth commission for Morocco.

At the turn of the millennium, Berber identity recognition began making some gains. Even before a truth commission was established in Morocco, the king had established a national human rights institution and installed Benzekri as its head. In July 2001, King Mohamed VI declared that the Amazigh identity contributed to Morocco's national wealth. He also announced the creation of a Royal Institute for Amazigh Culture (IRCAM).⁸²

In 2004, the king inaugurated the truth commission in Agadir. Agadir was a significant site for the Berber identity movement. In 1991, the Agadir Charter was promulgated by multiple Amazigh activist groups demanding cultural recognition for the community, forming a pivotal event for Moroccan Imazighen.⁸³

The truth commission, known as the IER (Instance Équité et Réconciliation), operated from December 2004 until November 2005. The King appointed Benzekri to lead the IER as its president, along with 16 other commission members.⁸⁴ The IER's mandate stretched from 1956 to 1999, and was focused on establishing the truth about past violations, providing reparations to victims and families and recommending measures aimed at preventing future abuses. However, the violations that the IER was mandated to address included only arbitrary detention and disappearances. It should be noted, however, that the IER's mandate on reparations specified that it 'should not be limited to paying compensation but should also include rehabilitation, both in an individual and collective sense, of the victims'.⁸⁵

The IER held public hearings in seven regions of Morocco where violations had been most severe. Many of the hearings were broadcast on Moroccan television and across the region on Al-Jazeera.⁸⁶ As with truth commissions around the world, Moroccans, especially those in civil society groups that had pushed hardest for the commission, expressed disappointment with its outcome – perpetrators could not be named, details of state involvement were not fully disclosed, and so on. A leader from the FVJ noted that '[w]hat we got is the truth decided and provided by the state'.⁸⁷

Scholars noted in the midst of the IER's work that one of its most important aspects could be its regional effects.⁸⁸ Today, as regimes across North Africa have been overtaken by popular revolution, this opinion has proved to be prescient, but, as one considers the Arab

Spring, it seems clear that Berber identity has been lost in the media's narrative of transition across most of North Africa. The difference in Morocco seems a powerful one by contrast.⁸⁹ In the face of protests at the beginning of 2011, the King instituted a constitutional review process. Instead of the deaths of thousands of protestors or a bloody civil revolt, Morocco has continued on its path of relatively peaceful but slow transition.⁹⁰

The new Moroccan constitution approved in a July 2011 referendum recognises Tamazight as an official language alongside Arabic; the indigenous Amazigh language will now be taught in schools. This is the first official recognition of Berber identity in any constitution in North Africa.⁹¹ Although many Berbers remain sceptical as to whether this new constitutional recognition will bring meaningful changes, the director of the Institut Royale de la Culture Amazigh (IRCAM) noted that 'l'usage de [la langue] l'amazigh aura un impact positif sur le développement' ['the use of the Amazigh language will have a positive impact on development']⁹². The new constitution also contains significant gains for women, which some see as intimately linked with the Berber identity movement.

The fate of women has been closely tied to the fate of the Berber population throughout Morocco's history ... Within Berber communities, women are the ones who preserve and transmit the language due to their family role in educating their children. As fewer women can read and write, they also preserve Berber oral tradition and are less likely to learn standard Arabic, the country's official language.⁹³

The inclusion of Berber identity in Morocco's slow – even if primarily symbolic – transition is meaningful for North Africa and the continent. It demonstrates that the recognition of indigenous identity can be an important factor in peaceful transition and, indeed, that African indigenous peoples can be leaders in transitional processes. However, the situation in Morocco is unique in that Berbers make up a substantial proportion of the population, an unusual circumstance for indigenous groups in Africa who generally are minorities.

TRANSITIONAL JUSTICE AND INDIGENOUSNESS

The case studies above demonstrate the range of ways in which the term 'indigenous' and the notion of indigenous identity has played into transitions across Africa. The cases demonstrate a spectrum of responses for transitional justice processes and governments – from denying the existence of indigenous groups to classing them as marginalised groups, to including gains for indigenous majorities in a slow process of reform. In Rwanda, it is clear that Batwa adoption and deployment of indigenous identity is completely at odds with the post-genocide Rwandan state's vision of a unified nation where ethnicity plays no role. Given the tragic events that led to transition in Rwanda, this vision is perhaps understandable, but largely unrealistic.

In South Africa, the narrative of transition that emerged was one that pitted 'indigenous' Africans in the new dispensation against non-indigenous white settlers in the old dispensation.

A similar narrative dominated in the Liberian transitional justice process, although the ‘settlers’ in Liberia were of African descent, returning to Liberia to establish a new nation. The South African narrative left no room for the unique concerns of the indigenous Khoe or San peoples in the TRC’s analysis. In both Rwanda and South Africa, the political denialism is made possible in part because the Twa, Khoe and San have such small numbers in comparison to other ethnic communities. However, this does not entirely explain the adoption of such a perspective, given that in Burundi the Twa have been more integrated into the transition process despite their small numbers. Rather, in South Africa the notion of indigeneness was appropriated in service of the main transitional goal – the end of white settler rule – and accordingly separate indigenous identities could not be accommodated until that initial transition had been solidified. In Rwanda, the state has made a decision to enforce policies that reject genocidal ideology in an extreme manner.

In Nigeria and Kenya, indigenous communities have been recognised and engaged as parties to the transition from oppressive post-colonial rule, but the notion of indigeneness has been merged into a long list of marginalised identities within a highly multi-ethnic polity. Nevertheless, the opening of the transitional justice space to indigenous and other marginalised groups is forcing transitional justice mechanisms in these countries to move well beyond the examination of civil and political rights violations that have been the staple of transitional justice in many contexts. The presence of indigenous groups in these processes and their framing of issues in terms of group rights and special relationships to ancestral lands ensured that issues of structural inequity and economic, social and cultural rights remain on the transitional justice agenda. This is an important development for the field of transitional justice, and will be particularly important to observe in Kenya, where the TJRC has not yet released its report. Despite the strong participation of indigenous communities during the TJRC public hearings, there are serious questions about the credibility of any report that may issue from the TJRC. Given the leadership crisis at the TJRC, the ongoing delays in the release of the report, and the highly charged political environment as Kenya heads toward its first elections under the new Constitution, the TJRC report may be irrevocably compromised.

In Morocco, one witnesses a merging of the differential political uses of the term ‘indigenous’. Indigenous Berbers are both the first inhabitants of the region, with a unique culture and relationship to the land, and are also the ‘indigenous’ majority in comparison to the settler regime. It may be for this reason that the Moroccan transition has been a relative success, at least with regard to Berber-identity rights⁹⁴. Where indigeneness applies in both the anti-colonial and the ‘first-peoples’ sense, it has double the power to force change. Moreover, Morocco’s largely dichotomous ethnic composition, as opposed to the multi-ethnic composition of Nigeria and Kenya, allows for gains that may not be realistic elsewhere. It is viable to have two official languages in Morocco, for instance, but having 50 to 100 is unmanageable.

The case studies make clear the multiple ways in which indigeneness is approached by African states as they develop new national paradigms of cohesion and diversity. Although

there have been some gains, depending on the context, those gains appear to be largely symbolic. The Ogoni, for example, continue to deal with environmental degradation and violations of their rights in their ancestral lands, despite the Oputa Panel's findings and other normative victories. Many Berbers remain sceptical of the gains in Morocco, even as the new constitution recognising their language goes into effect. Kenyan groups may have had the chance to testify in their indigenous language, but the TJRC's report and recommendations in relation to their human rights claims was months overdue at the time of writing and seems likely to be politically compromised.

Moreover, the cases demonstrate the way in which indigenesness is a tool that communities can deploy, when given the space to do so, in order to advocate for economic, social and cultural rights by distinguishing themselves from other communities with similar or competing claims. This is a complicated – and some would argue dangerous and unrealistic – use of indigenous identity in the context of a political transition. As Ndahinda points out, '[i]mplications of indigenous identification for other groups in multi-ethnic countries remains one feature of indigenous rights discourse in need of further clarification'.⁹⁵ This is an extremely important area for further examination, and lies at the heart of the nexus between transitional justice and indigenous rights. When should the indigenous rights framework be deployed by communities and/or transitional justice processes? How can it contribute positively or negatively to transitional debates in multi-ethnic nations?

Clearly, for some states this deployment of indigenous identification is too dangerous and complex to be allowed, as in the case of Rwanda and South Africa. Nigeria's Oputa Panel resolved this by sidestepping the indigenous nature of the Ogoni claim, but nevertheless recognising them as a marginalised group and making recommendations related to the fundamental group rights concerns that confront the community. It remains to be seen whether the Kenyan TJRC will directly draw on the international framework of indigenous rights in its recommendations. If it follows the lead of the transitional Kenyan constitution and other transitional justice entities in the country, it likely will remain in the safer territory of 'marginalisation'. However, is adoption of the middle-road approach, specifically the use of marginalisation as a proxy for indigenesness, a viable way to fully vindicate indigenous peoples' rights as they have been framed under international norms and now through the Endorois decision of the African Commission? Judging from the experience of the Ogoni and the multiple indigenous communities in Kenya, the rubric of marginalisation has offered little in terms of actual gains.

REMAINING QUESTIONS AND RECOMMENDATIONS FOR FURTHER RESEARCH

This chapter has begun a discussion of the interrelationship between African transitional justice and indigenous peoples' rights. Given that transitional justice is a policy framework in which indigenous peoples are operating and raising key questions, the intersection deserves further study for scholars and practitioners in both fields.

The case studies here describe how certain transitional justice processes include, recognise or exclude indigenous identities, but much more analysis remains to be done on how other components of transitional justice interact with indigenous peoples and the international framework of indigenous rights. The use of reparations is one critical area for further examination. Scholars from the Latin American context have noted that reparations programmes can help indigenous peoples ‘feel that they are being recognised as equal citizens not simply in an abstract sense, but also because the collectivities to which they belong are treated with equal respect – instead of oppressed, systematically marginalised, or structurally subordinated’.⁹⁶ This observation will be important to test in the African context – for instance, how can reparations programmes effectively incorporate group rights without denying unique individual harms and without perpetuating often hierarchical, patriarchal structures in many indigenous communities? Perhaps more critical, how can African governments address land reform as a reparative mechanism for past harms? Can the indignities done to indigenous groups as a result of the dispossession or degradation of their ancestral territories be redressed through existing transitional justice models? Does land reform play a prominent enough role in transitional justice across the continent? Documentation of the deliberations on the emerging African Union transitional justice policy suggests not yet.⁹⁷

There is also a need for further examination of how transitioning states adopt or reject international frameworks of indigenous rights as part of their post-transition legal landscape. Moreover, how does the adoption or normative integration of indigenous rights discourse impact the rest of the transitional process, if at all? Vetting of institutions, for instance, can begin the process of establishing ‘ethnic balance’ in those institutions, such as the police, security forces, judiciary and civil service. Despite the challenges of quota systems, affirmative action programmes for marginalised groups can be a particularly important component of transitional justice that can positively impact indigenous groups. For instance, the adoption in Kenya of legal recognition of historically marginalised groups, a category that specifically includes ‘an indigenous community that has retained and maintained a traditional lifestyle and livelihood based on a hunter or gatherer economy; or d) pastoral persons and communities, whether they are (i) nomadic; or (ii) a settled community which’⁹⁸ could have important impacts for indigenous groups on institutional reforms and vetting processes, etc. Despite the potential, capture of these mechanisms by elites (whose interest in ameliorating the situation of indigenous groups is questionable) is an ever-present danger. In Kenya, the nomination of the director of public prosecutions was a prime example. The nominee, a member of the Maasai elite, responded to credible attacks on his record and his ability to fulfil his constitutional duties by playing the ethnic card, and noting that the nominations process had to include previously marginalised groups.⁹⁹ Although a Maasai, the nominee’s claim to marginalisation was tenuous at best.¹⁰⁰ Documentation of these effects in other transitional contexts is an important area for additional research.

Finally, transitional justice can also be an important mechanism for fulfilling indigenous peoples’ right to participation and for rebuilding trust in governance structures.¹⁰¹

The fact that members of marginalised communities see for the first time that a state body is inviting them to participate, taking steps to accommodate their cultural rights such as language, and listening to their testimony, can be a powerful force or re-establishment of trust between the state and its citizens.¹⁰²

Additional elaboration of best practices in fostering indigenous peoples' participation in transitional justice processes would be a significant contribution to the field for both scholars and practitioners.¹⁰³ Even in cases in which there is strong participation, such participation may or may not lead to trust building with the state. In the case of Morocco, for instance, expectations for the truth commission process in particular were very high. There was clear disappointment expressed in the outcome from Berber groups, despite the fact that a Berber led the process, as described above. In Kenya also, indigenous communities have expressed very high hopes for the work of the TJRC, especially related to its ability to address historical land injustices. Should the TJRC fail to deliver on these expectations, as it almost certainly will – at least in part – the trust between communities and the state may be further damaged.

CONCLUSION

Ultimately, the intersection between transitional justice and indigenous rights raises the fundamental question of how individual and group identity relate to state power. Transitions provide an opportunity to renegotiate those relationships and to redress power imbalances.

Indigenous peoples are engaging in this renegotiation across Africa, with differing levels of success. The African Commission has laid out important normative principles in relation to the responsibility of states to address the rights of indigenous communities in its decision in the Endorois case, but implementation of these principles remains a huge challenge, in relation to the Endorois community and as well as to other indigenous groups across the continent. Whether transitional justice mechanisms, such as truth commissions and other processes, will contribute to elaboration and implementation of these norms or will continue to marginalise and pay lip service to indigenous rights remains an open question.

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 - To strive at creating a nation governed by the rule of law and respect for human rights
 - To combat any form of divisionism and discrimination
 - To promote interdependence and synergy in nation building
 - To multiply strive to heal one another's physical and psychological wounds while building future interpersonal trust based on truth telling, repentance and forgiveness
 - To commemorate the 1994 genocide with the aim of making 'Never Again' a reality.
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8

The past is never just in the past

Indigenous peoples and a framework
for confrontation and redress

Ridwan Laher¹

INTRODUCTION

In recent decades there has been a steady growth in the number of studies aimed at theorising and analysing the problem of confronting the past. This focus has in large part stemmed from a general consensus that the past, which can be described as an ‘ugly past’ in reference to associated human rights violations and other atrocities, cannot merely be ignored if individuals, societies and nation-states seek redress, reconciliation and progressive change.² A definitive characteristic of this research and writing is that a robust interdisciplinary literature has emerged to offer significant insights into the purposes and processes of confronting an ugly past. This chapter embraces this spirit and vigour of research by offering a discussion of the need to confront the oppressive conditions that indigenous peoples face in post-colonial Africa.³

What follows is an extension of previous work that focused on theorising a confrontation with the past and the politics of memory and identity.⁴ This chapter has three overarching purposes. First, the overall focus is on extending the conceptual terrain of confronting the past to indigenous peoples in Africa. The discussion is then moved on to the second objective of considering whether the emphasis of South Africa’s Truth and Reconciliation Commission (TRC) on truth telling may be an appropriate process for such a confrontation. Finally, the chapter draws together the discussion to evaluate the purpose of the nation-state as a moral community in addressing the place of indigenous peoples in post-colonial Africa.

To meet these objectives, the discussion below proposes a theoretical framework that describes the condition of indigenous peoples as collective trauma caused by colonial and post-colonial oppression and neglect. The emphasis on a collective trauma serves two analytical purposes that will be developed below. First, the condition is continuous and intergenerational. Second, a collective trauma is a severe disruption of life conditions, and therefore it cannot simply be ignored or dismissed. Taken together, these two analytical symptoms press the

need for further research. A significant purpose of such research would be to assist indigenous leaders, policymakers and their respective governments, civil society and non-governmental organisations towards implementing changes aimed at holistic redress.

The discussion part of this chapter, which appears at the very end, offers a contextual commentary on the overall strategy of confronting the past. The contention is that the untenable condition of indigenous peoples across Africa can be significantly addressed by a process of confrontation aimed at democratic nation building. Such a priority would be shaped by developmental policies that do not deride indigenous identities but rather promote and support wide-reaching socio-political and economic pluralisation. To get to this point, however, it is necessary to source the all-important political will of the ruling elite and other major stakeholders in the nation-state to address the problems of indigenous life.

In a discussion like this it is almost impossible to avoid delving into aspects of the nature of the African nation-state, particularly its constructed artificiality, so to speak. Questions pertaining to the content, character and priorities of the post-colonial nation-state cannot be avoided when analysts discuss aspects of nation building. In the African context this is no easy task, given that the post-colonial condition is fraught with structural and other socio-political and economic challenges inherited from colonial rule. In too many cases these debilitating conditions have worsened in a competitive global environment where national aspirations are frustrated by scarce development capital. Add to this the further domestic challenges of endemic political instability, weak state and civic institutions, and endemic corruption, and it becomes fairly plain to see why the concerns of indigenous peoples are not prioritised, let alone recognised.

The unfortunate reality for indigenous peoples in the post-colonial era is that they find themselves on the margins of nation building and in too many cases they are deemed to be hindrances to national developmental aspirations and policies. There is a tendency among the ruling elite to contest indigenous identities and developmental concerns, specifically as they relate to land tenure and reform, language and cultural rights, citizenship and political representation. The unavoidable outcome is that indigenous peoples endure endemic discrimination that underlines the continuing nature of the collective trauma suffered by indigenous peoples.

Before proceeding with the discussion, it is necessary to make a few theoretical and methodological observations about terms and assumptions. At the outset it must be recognised that this chapter is not a case study but rather a conceptual exercise aimed at theory building with an interdisciplinary focus. Throughout the discussion below, the term 'indigenous peoples' is used to describe communities across Africa who define themselves as original, aboriginal or first peoples, or in combined terms that press an understanding of being the descendants of ancient peoples. The intention here is not to provide an analysis of what it means to be indigenous or to explore what the related term 'indigeneity' may suggest, even though these are important and relevant discussions nonetheless. Furthermore, it is not the intention here to apply an analytical gloss that assimilates indigenous peoples into a

theoretical sameness despite the variances in communal history, politics, culture, language, religion and heritage that are ascribed to particular identity formations.

For the purposes of this chapter it is accepted that indigenous peoples lay claim to varying and complex identities that have always been and will continue to be a part of the socio-political landscape of Africa. It should not, however, be assumed that the term 'indigenous peoples', as it is used here, promotes or advances an essentialised, ennobled and/or romanticised characterisation of communities that cover the length and breadth of Africa.⁵ At the most, the term is used to denote communities who self-define themselves as indigenous and who have, more often than not, found themselves victims of systematic oppression and marginalisation during the European and post-colonial eras. If anything, it is this combined historical and political experience, inclusive of its contextual peculiarities, that allows for a theorisation and analysis of the condition(s) of indigenous peoples.

It is also important to speak to issues of agency when attempting an analysis of any group to which the writer does not belong. The methodological correctness of this is to be found in the now widely quoted question posed by academic, Gayatri Spivak. The question simply and provocatively asks: 'Can the subaltern speak?'⁶ It is an important question that must be considered whenever analysts of any disciplinary kind attempt to look into the prism of the 'Other', so to speak. The awareness not to appropriate the voice(s) of indigenous peoples and to engage in a process of 'othering' is a constant thread that binds the discussion below.⁷ The position taken throughout is that indigenous peoples cannot be excluded from any processes of the post-colonial nation-state. It is a progressive position developed around a pluralist articulation of the nation-state as a site for inclusive representation and democratic development.

This necessary and unavoidable space for self-expression and self-definition is partly drawn from the important inputs that have been made in feminist literature, particularly among black feminist academics and writers such as bell hooks, Audre Lorde and Patricia Hill Collins.⁸ Though writing from the outside here and being aware of the considerable limitations that this imposes, the analysis below is vested in the assertion that any confrontation of the ugly past must seek progressive inclusion of both victims and perpetrators. Furthermore, taking more than a page from the work of the late progenitor of post-colonial studies, Edward Said, the analysis below is careful not to 'orientalise' the discussion by employing tropes that locate indigenous peoples as a subject (or subjects) to be understood or a problem to be solved.⁹

Finally, it is necessary that any call for a review of the past must be based on a guiding standard or set of rules. The discussion below is formed around a broad acceptance of the universality of human rights as expounded by the United Nations (UN) in its 1948 Universal Declaration of Human Rights. Appearing at the end of World War II, the Declaration sought to set a standard by which nation-states are judged on their record of human rights. The purpose was to stop or discourage gross violations of human rights and the effect was to equalise the standard of what it means to be human inside the nation-state system. The emphasis on universality also suggests that human rights reach back into the past, and

also project into the future. This means that judgements based on the universality of human rights, and their application, are not bound by time and historical space. This levelling means that it is quite possible and appropriate to confront the indigenous past in Africa and to hold sovereign nation-states responsible for actions that run contrary to the spirit of the Universal Declaration.¹⁰

DISPOSSESSION AS HISTORICAL CONTEXT

Indigenous peoples in Africa have suffered grievous dispossession since the advent of colonialism through the current epoch of post-colonial independence. In the colonial era, large tracts of land were confiscated, rendering indigenous communities displaced and disconnected from their ancient places of settlement and society. Those indigenous peoples who were not effectively removed from their land were mostly located in rural areas far from the immediate and evolving interests of the colonial rulers. National independence did not break the cycle of land dispossession and displacement of indigenous peoples. The new political elite not only failed to restore the land that was confiscated in colonial times, but in many cases a greater dispossession was enacted as post-colonial states turned huge tracts of land into game reserves, farmland, urban schemes and other developmental projects aimed at modernisation.

This wholesale and uninterrupted process of land dispossession is at the root of untenable conditions that describe indigenous life. Despite the severity of the injury and the blatant abuse of power that brought about this abuse of human rights, there has been very little substantive movement to recognise the plight of indigenous peoples. Instead, post-colonial nation-states have mostly refused to even recognise indigenous peoples as the descendants of ancient peoples. This refusal is often couched in language that describes indigenous peoples as uncivilised and trapped in pre-modern times. This was the case in 2010 when President Ian Khama of Botswana infamously vented his fury at indigenous communities of the Central Kalahari Game Reserve (CKGR), describing them as 'primeval', 'primitive', 'backward' and 'deprived' and 'co-existing alongside wild animals'.¹¹

President Khama's vitriol was generally directed at the Gana, Gwi, Tsila Bushmen and Bakgalagadi communities, and arose in a dispute over water access and rights in the game reserve. The CKGR is a profitable tourist venue that attracts international visitors who bring coveted foreign currency into the economy of Botswana. President Khama's attitude conveyed a distinct embarrassment and annoyance that the indigenous peoples of the CKGR sought unfettered access to the reserve and to its underground water. In effect, the claim was viewed as running contrary to national development priorities. Botswana's environmental minister, Kitso Mokaila, added further injury to the president's insult by describing the Bushmen as people 'living in the dark ages in the middle of nowhere as a choice' when the 'world has moved forward'.¹² The damning admonishment was clear; indigenous peoples in the CKGR

must modernise in keeping with the government's national priorities or face the certain fate of perishing.

The Botswana case is not unique. There are many more documented cases and even more undocumented ones that find indigenous peoples clashing with the whims of political elites. These clashes are nothing short of enduring struggles for recognition, inclusion and, most of all, survival. In Botswana the rights of the ancient inhabitants of the CKGR prevailed over the prejudices of Khama and his administration. It was a long drawn-out contestation that ended in 2011 when the Botswana High Court of Appeal ruled that the affected communities could use their boreholes for water and develop new ones in the game reserve. Their troubles are, however, not behind them as evidence of new harassment and intimidation by authorities against indigenous people in the CKGR continues to surface.¹³

The fact that the affected indigenous communities in Botswana sought justice in the court system is significant and instructive for at least three reasons. First, despite the prejudicial labelling applied by President Khama and his environmental minister, the indigenous peoples of the CKGR are far from 'backward' and on the brink of self-imposed extermination. In fact, the act of seeking relief in the court system shows that they are politically sophisticated and adept. Furthermore, though they are aware of their contested place in the post-colonial nation-state, this awareness has not translated into an aversion to use the state's instruments in their defence. The third, and more generally related observation, is that the position of the indigenous peoples in the CKGR highlights the inherent artificiality of the post-colonial nation-state. This artificiality, as characterised by ongoing episodes of dispossession, illustrates the contradictions or fault lines that are inherent in the post-colonial nation-state. The latter is dealt with in more detail in the subsequent section, but before doing so it is necessary to expand on the meaning of dispossession for greater analytical clarity.

It would be misleading to assume that land dispossession adequately describes the historical dispossession suffered by indigenous peoples. Though land is the central variable, there is a need to recognise that both the colonial and post-colonial eras have wrought a larger and more complex existential dispossession. Entire socio-political and economic systems of indigenous rule were disrupted along with the erosion of cultural practices, religious belief systems and languages, among other crucial identity and heritage markers. In effect, the very essence of what it means to be indigenous and human was uprooted and displaced.

The historical context of dispossession, therefore, forces analysts to recognise that restoring the dignity of indigenous peoples is a matter of holistic and long-term redress. Policies that must emanate from the post-colonial nation-state will inevitably have to confront the substance of oppression and benign neglect. The big elephant in the room, however, is the role of the state in redress. Tough questions about the makeup and purpose of the post-colonial state must be asked if any redress is to be wide ranging and meaningful. A good place to start may be to ask why indigenous peoples have been so maligned and marginalised in the post-colonial nation-state. This question is relevant because, in general, the era of independence was supposed to beckon the end of dispossession for all Africans.

THE POST-COLONIAL NATION-STATE AS A SITE FOR DISFIGUREMENT

The end of colonialism did not sever the reality of dispossession suffered by indigenous peoples. A significant reason for this can be found in the nature of the transition from colonialism to independence and the character of the post-colonial state. At once, it is important to recognise that the staggered end of colonialism is more aptly described as a negotiated settlement rather than an outright revolution. The latter condition may give rise to expectations that the era of independence was a distinct severing with the past, but this is misplaced. Closer to the reality of what happened is a contentious balancing of interests between the colonial authorities and the rising political elite who inherited power.

This characterisation does not mean to belittle or ignore the force of anti-colonial struggles that demonstrated massive resistance throughout the African continent. It also does not suggest that less must be made of the liberation strategies that in large part made the colonial project unworkable. Furthermore, there is hardly reason to deny the genuineness of relief and resolve that accompanied the end of colonialism. To do any of these would be disingenuous at best. For the most part, and this is an important point when considering the expectations of the post-colonial nation, the era of independence ushered in unprecedented hopes and aspirations for a turn toward restorative justice.

The themes of liberation that accompanied independence expressed the expected arrival of a new era of freedom, equality and substantive democracy. Celebrations that accompanied the inauguration of new leaders were buoyed by the expectation that the heritage that was lost would be restored and that the ugly past would extract varying measures of equitable redress and reconciliation. Independence was a time of elation and of making new national myths to ostensibly guide the nation-state into the future. Sadly, though, the honeymoon period – so to speak – soon gave way to the reality of seemingly insurmountable challenges facing the newly independent nation-states. The gravest of those realities was that the legacy of colonialism lived on past the celebration of its demise.¹⁴

For observers of the troubled period that ensued, the level of analysis can be directed at two overriding concerns. First, the artificiality of the post-colonial state is rooted in the ‘common sense’ of colonialism.¹⁵ Second, the nature of the transition essentially entrenched this artificiality through a process of succession that kept the Frankenstein-like nation-state with all its sewn-on appendages and pre-disposed externalities firmly in place. Colonialism thus rendered the post-colonial nation-state unbalanced and pre-disposed to inherent contradictions, despite the euphoria of independence. This imbalance was made worse by narrow stunting interests among the political elite who were hemmed in by the terms of independence. The intent here is not to describe the new rulers as mere victims of their oppressive past. That would be simplistic in the best of terms. The larger point is that the political terms and structural conditions of independence created the fertile grounds for unbalanced, unviable, corrupt and generally undemocratic post-colonial nation-states. These are all elements that cannot just be untangled from the nature of post-colonial rule and the place of indigenous peoples in the independent nation-state.

In hindsight, it was perhaps unreasonable to expect that independence could create or rather foster coherent and democratic nation-states where the concerns of indigenous peoples would be in the mainstream of policy attention. It is therefore hardly surprising that indigenous peoples have not escaped their imposed marginality in the era of independence. The hard truth is that the post-colonial nation-state, like its predecessor, is a disfiguring site where indigenous peoples are more likely to be considered pre-modern impediments and uncivilised liabilities – as the Botswana case above illustrates – than equal citizens.

The problem then is that the era of independence was not purposefully aimed at reversing the past. Rather, in more than just general terms, independence has prolonged the past and its critical elements of disruption and disfigurement. State succession, in effect, typically finds the new political elite playing an old game with a modicum of amended rules that amount to no more than neo-colonial dependence in both structure and political orientation. There is an expansive literature that deals with the problem of neo-colonialism and the post-colonial nation-state, and it is likely to expand even further now that the age of fighting terrorism is witnessing Western interventions and a growing military presence of the US and former colonial powers on the continent.¹⁶ These are troubling times that beckon renewed concerns about the project of democracy and the quality of sovereign independence from interference – for whatever reasons – from the developed North. It is also a time that heightens the real anxiety that indigenous peoples are especially vulnerable where Western interventions lead to political uncertainty, instability and regime change.¹⁷

For the immediate purposes here the emphasis is on confronting the political mindset within the nation-state that has entrenched the marginality and disfigurement of indigenous peoples. It is an orientation that maintained the socio-political space and territorial marking of the colonial state with its 'bifurcated' colonial common sense of 'citizen and subject' largely intact.¹⁸ As a result, the processes of nation building as expressed in concerns and interests that pertain to national development flow from capital centres and urban areas to rural and remote outreaches. It is also a mindset that looks to the developed North for its inspiration and progress markers instead of drawing on indigenous knowledge systems and skills.

These inherited ruling assumptions, along with their borrowed developmental gaze, mean that indigenous peoples are unlikely to escape the development trajectory that inevitably requires greater resources like minerals, water and farmland.¹⁹ National development in this context is the frontier for a greater clash and the totalised subordination of indigenous peoples. This is especially true when we consider that most indigenous peoples live in rural or remote lands that contain the prospects of more developmental resources. The implication is that indigenous life remains precarious and open to colonial-like intrusion and rearrangement well into the era of independence that was expected to bring about restorative justice. If this trajectory is left unchecked, greater violence directed at indigenous peoples will be inevitable, and the real concerns of final decimation and erasure are inescapable.

If the post-colonial nation-state is a site of disfigurement, and if we consider what has happened to indigenous peoples to be a gross violation of universal human rights, it is timely

to propose a critical intervention of sorts. An intervention would necessarily be predisposed to re-imagining the post-colonial nation-state and the place of indigenous peoples inside of it.²⁰ Such a re-imagining is inevitably a confrontation with the ugly past and its thematic and structural implications for the present and the distant future.

UNDERSTANDING INDIGENOUS DISPOSSESSION AS A COLLECTIVE TRAUMA

It is true that for most indigenous peoples the issue of land dispossession remains a central feature of post-colonial life. Building on previous work aimed at understanding national traumas, the emphasis here is to press the fact that land dispossession from the inception of colonialism through to independence in effect resembles a collective trauma. A collective national trauma can be generally described as an event, or a series of events, that significantly disrupts the normal routine of a nation-state. The response to a national trauma is largely characterised by a sense of disbelief. Those affected are left reeling as they try to make sense of what has happened.²¹ As time ensues, the associated maladies that surface are not unlike the trauma responses suffered by individuals who have had their lives disrupted by a significant and traumatic event like the death of a parent, being raped or suffering a violent assault. Both individual victims and nations that suffer trauma experience disbelief at what took place and often the process of trying to make sense of the ugliness leads to episodes of anger, irritability, withdrawal, dislocation and other associated psychological maladies. In all, the trauma experience finds the victim struggling to cope with the circumstances that have pierced a normal routine in a disruptive manner that cannot just be easily resolved, ignored or denied.²²

Collective national traumas are separated into two types to better understand their impact and long-term consequences. The first type is an acute trauma, which is defined by its relatively short duration. The assassination of a leader or a mass shooting at a school, for example, is described as acute trauma. In early 2013 the mass shooting of elementary school children in the US state of Connecticut was a piercing disruption of a normal routine that led to collective disbelief and a painful coming to terms with the grief that ensued. The American nation was shocked in collective terms but as the weeks passed the tragedy was absorbed as people began to make sense of the trauma by making needed repairs to the punctured and disrupted social system.

The second type of trauma is described by its chronic nature. A chronic trauma, unlike an acute one, is a permanent disruption of the socio-political and psychological life of a nation. It is a collective trauma because it cannot be ignored and its consequences are shared across the nation. European colonialism in Africa can be described as a chronic trauma that has permanently ruptured the normal routine of African peoples. Land dispossession is a key to understanding the nature of this chronic trauma that by definition stretches from the time of colonial impact through to the present. This means that a chronic trauma is not only collective in terms of first impact, but it is also collective in the sense that it is generational.

This is particularly true for indigenous peoples since their dispossession is continuous and has hardly been resolved.²³

The enduring nature of a chronic trauma means that it cannot merely be swept aside or under the metaphorical carpet of history. The ugliness of the past and its relevance in the present requires remedial redress. Where a chronic trauma is ignored or given a paucity of attention, the outcome is akin to a festering wound that has implications for the entire socio-political system of a nation-state. Ignoring the past is simply not a viable option for nation-states; particular those busy with the task of democratic realignment and pluralistic nation building. To address the nature of a chronic trauma, there is an urgent need for socio-political repair. Such repair requires a necessary confrontation with what happened in a process aimed at making sense of the past and its enduring disruptions and inequities. In this sense, a chronic trauma is like an acute trauma, and nations and individuals cannot address its impact unless there is a concerted effort to make sense of the disruption.²⁴

There is a pressing need for research to understand the extent of the chronic trauma suffered by indigenous peoples. Such research would necessarily connect land and identity dispossession, and explore the manner in which socio-political and economic repair work, or redress, needs to be implemented. These aspects are unavoidably intertwined with the normative expectations of democratic nation building and the universal notions of human rights. The formative and overarching question for such research is to ask why it is in the political interests of post-colonial states to confront the past in order to make sense of the chronic trauma suffered by indigenous peoples. The further question is how to institute such a confrontation with the past. What follows next in the discussion is just one form of confrontation with the ugly past, and it is purposefully state-centric in keeping with the position above that the post-colonial nation-state must be re-imagined. If a moral community seeks to address the ugly past with an eye to making sense of it, seeking healing and redress, then it seems inevitable that it officially records the truth as told by its victims and perpetrators.

CONFRONTING CHRONIC TRAUMA THROUGH TRUTH TELLING

In recent decades we have witnessed a plethora of attempts by nations across the globe to come to terms with the atrocities of an ugly past. As a result we have seen nation-states institute formal processes to establish the truth about past atrocities and enter the findings into the public record. This process has been popularly dubbed 'truth telling', in part because of reliance on testimony from victims and perpetrators. Running alongside these kinds of investigations there has also been formal recognition of past abuses by heads of state and other public figures. Often these recognitions have been accompanied by apologies for transgressions. The popularity of this kind of recognition led some analysts to describe the contemporary period as the age of apologies.²⁵

Truth telling and apologies have pressed leaders and citizens alike to accept the fact that state resources have been used to systematically oppress sections of their populations. The

outcome has led to painful and jarring recognitions – even guilt – of the propensity of nation-states to engage in genocide, racism, ethnocide, religious and cultural suppression, sexual violence and gender oppression. What is most apparent from these disparate confrontations is the importance of recognising that an injustice has occurred and that a collective trauma has resulted that warrants a critical intervention.

In the contemporary era, well at least since the end of World War II, the view of what makes up a collective trauma has been profoundly shaped by the adoption of the Universal Declaration of Human Rights by the UN. The Universal Declaration served as the basis for interrogating war crimes in Germany and Japan, for example, and it also established universal moral and ethical expectations on how subsets of any population, anywhere, are to be treated. In effect, the Universal Declaration formally established the binding view that there are universal moral principles that make us human.

These principles transcend narrow definitions of national sovereignty, and nullify arguments for cultural, religious and political relativism.

The emphasis on the universality of the human condition also infers a distinctive timelessness to the claim. This means that it is entirely possible to make comparisons and judgements across historical periods. This is an important point because it allows for the interrogation of socio-political disruptions that are not bound by time and circumstance. It also allows for the further recognition that abuses do not occur in a vacuum. In other words, when judging the human rights record of any period, it is entirely possible to reach back into history and to project into the future because the principles remain universal.

The momentum toward confronting the past and collecting memories through testimony and other evidence gained significant popularity around the time that South Africa's first black president, Nelson Mandela, was released from prison in 1990. The manner in which the political stakeholders negotiated the end of white rule provided the backdrop for the necessary consensus, inclusive of political will, to confront the atrocities of apartheid. What emerged was the Truth and Reconciliation Commission (TRC) tasked with uncovering the past and making it known. Making the past known through official sanction is an important legitimising act and process. This is true for both the state and the victims of abuses. In the case of the TRC, the framers envisioned the process of truth telling as a basis for establishing an official narrative of the past that was aimed at inclusive nation building. For the victims of apartheid who testified, truth telling was an historical uncovering of past abuses that had been hidden and denied by the apartheid state.²⁶ Truth telling in these terms can be seen to be a critical intervention to break the silence of the past and to open the space for a greater articulation of what is needed to implement change and redress.

There is undeniable value in making the past known and entering the chronicled abuses into the official record of any nation-state that seeks to uphold the value of human rights and the purpose of democracy. The persistent problem that emerges during and long after a process of official truth telling is done has to do with the all-important matter of national reconciliation. How much reconciliation can South Africa lay claim to since the TRC's final report was handed to then President Mandela in 1998? This is a layered question that cannot

easily be answered without paying mind to the manner in which the purpose of the TRC was framed. In effect, the overall purpose of the TRC was guided by dominant political interests and the terms of the negotiated settlement that brought apartheid, at least in its legislative terms, to an end in 1994. Those who thought that former apartheid leaders and perpetrators of gross human rights violations would be found guilty and imprisoned were very likely dismayed by the extension of a blanket amnesty. This amnesty functioned as an incentive for perpetrators to come forward and tell the truth about past abuses and, in so doing, the fear of being prosecuted in criminal or civil courts was removed.²⁷

A blanket amnesty for perpetrators was a controversial aspect of the TRC process. In effect, the apartheid state was not on trial but rather individual actors who carried out human rights abuses. In retrospect it is somewhat clearer today to see that what the TRC managed was a careful and narrowed investigation of the ugly past. In this regard, the truth that was uncovered was just the beginning and by definition almost certainly inadequate in a holistic sense. In these terms, the measurement of reconciliation is almost always a matter of political assessment against the backdrop of the importance of building a nation after the harrowing era of legislated apartheid. And it is perhaps at this juncture that research into confronting an ugly past can separate the purpose of setting the record straight in terms of knowing the past and the policy imperatives of managing the past and its implications into the future. What this means is that it is unreasonable to expect that a process like the TRC could guarantee reconciliation once its work was completed. The manner in which a nation reconciles has a lot more to do with the character of institutions that emerge to shepherd the nation-state away from its ugly past. The TRC, despite its limitations, was a good-faith attempt to open the historical record for review, and in so doing it set an official precedent by condemning apartheid as a crime against humanity.²⁸

The TRC was not designed and implemented to deal with questions, issues and policies that pertain to indigenous peoples under apartheid. The same is true for the systematic oppression suffered by women under apartheid. These oversights were a function of how the TRC was envisioned and implemented. Nonetheless, if we are to take pages from the TRC and apply them to the purpose of an official investigation into the ugly past that describes indigenous life in Africa, it would have to begin with the general acceptance that there is a need to uncover the nature of the chronic trauma through a process of truth telling. This is the first step toward breaking the silence about abuses and the nature of the chronic trauma suffered; it is also an important act of empowerment.

Selective forgetting, or what Stephen Bertman defined as 'cultural amnesia', would defeat this purpose.²⁹ The purpose of telling the truth about indigenous life is in large part aimed at accountability, and accountability is predisposed on the function and viability of the nation-state as a moral community. The implication here is that confronting the past is not only a matter of making the past known and seeking redress, but it is also a matter of creating the moral context to guard against the recurrence of similar or related abuses. In this sense, confronting the indigenous past through truth telling is about democratisation and nation building.

TOWARDS A MORAL COMMUNITY

In the discussion above, the purpose of re-imagining the African nation-state is conceptualised to be a second chance to come to grips with an ugly past. It should not, however, be assumed that nations are natural entities that have evolved in a linear process of progress even in the best of circumstances. The formative assumption is that all nations are purposeful constructions or, as Benedict Anderson has argued, they are 'imagined communities'.⁵⁰ Part of the process of imagining and re-imagining a nation is creating the myths that bind groups to the concept and purpose of being a nation. These myths are in effect stories that are told about the character of the nation, and it is the character of a nation that reflects its moral standards.

Since nations are not natural entities, it follows that moral communities have to be created out of concern for the overall welfare of all groups that belong to a nation-state. A moral community expressly sets boundaries about what is acceptable behaviour and what is not.⁵¹ To put such moral fibre in place, a nation-state must know its past and the abuses that are often obscured by narrow political interests and outright denial. How then is it possible to know the extent of oppression and impoverishment suffered by indigenous communities if they are contained by widespread prejudices about their identity, culture and history? The short answer is that it is not possible.

A moral community would necessarily expose the manner in which a nation-state has acted to prejudice and discriminate against any group. Such action is, after all, the very definition of what it means to be a moral community. The position and action that is taken can be seen to be a kind of sacred ground to guard against violations of the socio-political character and order of the nation-state. It is for this reason that just about every South African heard President Nelson Mandela on the day of his inauguration in 1994 when he said that 'never and never again' will apartheid rule in South Africa.⁵²

President Mandela's promise served as a kind of reaffirmation of a moral contract between elected leaders and the citizenry. The contract is drawn from the all-important matters of accountability and legitimate rule. A moral community acts to keep political leaders accountable. Rule based on accountability is therefore a process of ongoing legitimisation. Where substantial violations of the moral order have acted to damage the socio-political system, it is the nation as a moral community that rises to call for accountability. In the absence of accountability, the flagrant abuse of indigenous human rights is nothing short of despotic rule, and its perpetuation works to undermine the coherence of the nation-state.

To guard against such a crisis, the purpose of upholding universal human rights becomes the standard by which a moral community judges the coherence and harmony inside a nation-state. Respecting universal human rights thus becomes the business of both the nation and the state. Where lapses occur, the truth must be told and the consequences must be confronted. Such action works toward a greater sense of inclusion which returns to the purpose of securing accountability and affirming legitimate rule.⁵³

From this discussion it can be inferred that moral communities are not static entities. Though human rights are universal and their application reaches into the past and the future,

the purpose of making sense of an ugly past is generational. It is here where the role of civil society functions independently from state-directed truth telling as conceived of by South Africa's TRC. Inside of civil society the functions of artists, educators, and religious and cultural organisations, among others, act to add new levels of meaning and interpretation to the past. The important reality is that the past is not hidden but open to interpretation and evaluation. A necessary ingredient of such an ongoing process is the democratic value of free speech and freedom of expression.

For indigenous peoples, the oversight of a moral community that abides by universal human rights means that they are open to articulate their past and to restore identity markers in keeping with the energy and needs of subsequent generations. This is important because confronting the ugly past is decidedly a generational process toward restoration and adaptation. Furthermore, as socio-political and cultural identities inevitably adapt and transition in a global environment fuelled by technological advancements and expanding developmental horizons, it is the foundation of a moral community that preserves and protects the interests of all citizens in the nation-state.

THE STODGY ISSUE OF POLITICAL WILL

In 2007 the UN General Assembly adopted the Declaration on the Rights of Indigenous Peoples after a tense and protracted debate that lasted more than two decades from inception to conclusion.³⁴ The debate continues today even as indigenous communities in Australia, Bolivia, Canada, India, Kenya, Namibia, Nigeria, South Africa and the US, among other nation-states, battle to have their rights recognised. It is a contentious battle that will no doubt draw more than just a few seasoned indigenous activists to view some of the discussion above as too idealistic and even fanciful. This position will in no small measure be drawn from protracted and bitter experiences across the globe where states have just refused outright to acknowledge indigenous peoples, and their collective rights and claims for redress. Instead, nation-states have coalesced with multinational corporations to further disenfranchise indigenous peoples in the march toward seeking and securing more developmental resources and spaces. Indigenous rights are, therefore, a global struggle for recognition, redress, restoration and overall dignity, and it is instructive that indigenous peoples have united across cultural, political and geographic boundaries to press for greater awareness of their collective plight.

It is similarly instructive that indigenous peoples in Africa have moved beyond state-centric mechanisms to make their grievances known. In 2010 the Endorois people of Kenya achieved what is perhaps the most consequential ruling over indigenous rights and its articulation in the post-colonial nation-state to date. On the strength of the ruling by the African Commission on Human and Peoples' Rights (ACHPR) where the Endorois case against the government of Kenya was adjudicated, the African Union (AU) formally acknowledged the existence of indigenous peoples. The Endorois case is highly significant because it

represents the first time that an international body has recognised – via a binding ruling for African member states – that indigenous peoples have a right to define their development and to participate fully in how this is implemented. The decision also marks the first time that the AU has ruled in favour of indigenous peoples and their right to occupy and develop ancestral lands.³⁵

The political effect of the decision is to move indigenous peoples from the margins of the post-colonial African nation-state. It is a historic moment in the struggle for indigenous rights, not only for Africans but for indigenous peoples everywhere. A cursory reading of both the UN Declaration of Indigenous Rights and the Endorois ruling will show that the latter has moved the goalposts of inclusive and transparent treatment of indigenous peoples in the post-colonial state even closer. Where political will is absent or weak among the ruling political elite, this monumental ruling gives as much reason for the unfettered inclusion of indigenous peoples in the life of the nation as it instructs the post-colonial leadership to oversee their developmental welfare, and socio-political and cultural integrity. In terms of the advocacy for collective rights and impetus toward redress, the impact of the Endorois case cannot be understated.

The metaphorical fly in the political ointment is, however, the stodgy issue of compliance. In the Endorois case the Kenyan government has missed stipulated deadlines to implement the redress provisions of the decision. In effect, it can be seen to be dragging its feet despite the binding nature of the decision. The problem from a *realpolitik* point of view is that the AU has very little power to enforce the decision.³⁶ This problem is still exacerbated by the general dismissive tendency among post-colonial ruling elites to regard indigenous peoples as a hindrance to national interests and capital-directed development. The implications of this troubling reality are currently playing out between the indigenous peoples – and other residents – of Lamu District and the Kenyan government over a planned seaport in Manda Bay which is in Kenya's Coast Province.³⁷

The planned seaport forms part of a trade and transport corridor that will connect the Lamu District to southern Sudan and Ethiopia. The corridor, referred to as the Lamu Southern Sudan Ethiopia (LAPSSET) corridor, forms part of the government's national development plan known as 'Kenya Vision 2030', which professes the ambition of turning Kenya into a middle-income nation.³⁸ Indigenous peoples in Lamu District vehemently oppose the LAPSSET corridor because they, and other residents, view it as a land grab akin to further colonialisation, which is made worse by the fact that land claims made since independence in 1963 are yet to be settled.³⁹

Opponents of the corridor have organised themselves into community advocacy groups that point to the expected devastation to culture and heritage of Lamu District if the corridor is built. As of this writing, the Kenyan government has steadfastly ignored the protests and seems adamant to continue with the corridor. This is so despite the weight of the ruling in the Endorois case and, not with a little irony, the spirit of the new Kenyan constitution which the indigenous activist group, Samburu Women for Education and Environment Development Organization (SWEEDO), praised in 2010 as a clean break with the past and which provides

several avenues for the pursuit and strengthening of indigenous peoples' personal and collective rights.⁴⁰

The lack of political will not to marginalise indigenous peoples is, of course, not unique to Kenya or any other African nation-state for that matter. In recent years the government of Ethiopia has embarked on what can only be described as a vicious displacement of the indigenous Oromo as it proceeds with the Gibe III dam project.⁴¹ As is the case in Lamu District, the Oromo have been excluded from participating in the decision to build the dam, and the future for their overall cultural survival and way of life is threatened. There is no small irony in the fact that the tensions being played out between the ruling post-colonial elite mirror the manner in which European colonialists embarked on large-scale land dispossession. Post-colonial leaders will, however, be quick to point out that they are embarking on national development that seeks to benefit all their citizens. Very little, if any, recognition will be given to the plight of indigenous peoples to hold onto their land and their way of life because such concerns are not usually considered national development priorities.

Measured against the capitalised priorities of development, the political will to deal fairly with indigenous peoples is a persistent problem. It is of no small significance that indigenous peoples persist in pushing for their rights even though their place in the post-colonial African nation-state is tense and an often violently contested terrain. In South Africa, indigenous leaders and community members participated in a workshop on land restitution in mid-February 2012 to raise their concerns that their claims had been inadequately addressed. The three-day meeting hosted by the Department of Development and Land Reform dedicated the first two days to a discussion of land restitution concerns using the backdrop of the 100th anniversary of the apartheid era's Land Act of 1913. It was through the Land Act that the apartheid government removed black Africans, including indigenous peoples, from just under 90 per cent of the land.⁴²

The purpose of the workshop was to signal the South African government's intention to reopen land restitution claims, particularly those that are considered exceptional and pre-date the Land Act. What emerged from the discussion, often heated and at times inescapably emotional, was that indigenous communities sought a larger redress that went beyond the agreed-upon restitution of dispossessed land. Such redress would enlarge upon the acceptance that indigenous identity cannot be separated from the land, and includes the needed attention to restoring socio-political and cultural heritage. In effect, the outcome of the workshop was to declare the matter of land restitution and indigenous rights another chapter of unfinished business in South Africa's two decades of post-apartheid rule.⁴³

The workshop coincided with President Jacob Zuma's 14 February 2013 State of the Nation address in which he mooted the reopening of land restitution claims.⁴⁴ As of this writing, the reopening of claims will be a matter of developing draft legislation. It is unclear, at least in political terms, whether the president and the ruling African National Congress (ANC) will be able to persuade legislators to adopt such legislation. What is clear is that the leadership recognises the need to address the unfinished business of indigenous land restitution. The presence of the necessary political will and developmental motivation is a positive indication

of the moral commitment to move indigenous peoples and their struggles from the margins of the post-colonial nation-state.

That said, there simply are no guarantees. The course of redress for indigenous peoples remains a matter of persistent struggle and agitation towards confronting the ugly past. It is the content and course of this struggle that will continue to bring pressure on political leaders to adopt more progressive attitudes toward indigenous rights. We can also expect that indigenous peoples across the globe will continue to work in tandem to bring greater awareness of indigenous rights. Where political leaders refuse to accept indigenous peoples and their claims for redress, the attending issues will hardly be hidden. The age of information sharing exceeds the ability of leaders to just deny and suppress indigenous movements seeking redress. If the Endorois case proves one significant point, it must be that the agitation toward redress and indigenous rights will not just dissipate under policies of neglect and denial. Indigenous peoples have been confronting the ugly past since the first intrusion and rearrangement of their traditional way(s) of life, and so the matter of political will must be tempered by changing pressures in the domestic and global environments. Those stodgy political leaders who are less inclined to accept the call for a confrontation with the ugly past may find themselves on the wrong side of history.

CONCLUSION

The overall contention here is that a framework of confronting the ugly past through a process of truth telling offers the needed opportunity to review the marginal conditions of indigenous peoples across the African continent. A formative assumption of this theorisation is the position that indigenous life is characterised by a chronic trauma drawn from land dispossession that began during the time of European colonialism and was consequently entrenched in the post-colonial era of independence. The chronic nature of this collective trauma cannot simply be denied or hidden because it poses significant consequences for accountable and legitimate post-colonial nation-states.

Though most African nation-states are less inclined to confront the nature of this chronic trauma, the reality is that it cannot be ignored because it undermines the very purpose of situating the post-colonial nation as a moral community. Re-imagining the nation-state is a formative decision toward nation building that is inclusive and progressive. In such a process, denying or suppressing the ugly past are not reasonable options. The past will refuse to remain buried, as Judith Herman argues, and for this reason it is in the interests of the nation-state to make the past known through a process of truth telling.⁴⁵ The tendency to forget or put the past behind may appear to be a viable option in the short run but in historical consequence it leaves in place the tremendous damage that has been done to the social system. A nation that functions as a moral community would seek not to hide the past but to uncover its damage so as to remedy and expand the cohesion of the social system. Consequently, opening the past for review is dependent on knowing the

extent of abuses of authority that crossed the boundaries of what a nation considers moral and legitimate.

The strength of utilising this framework for confrontation lies in the processes of making the past known for purposes of democratic nation building. The TRC offers some pointed insight into the need to confront the past and to make it known as a part of a nation-state's mythology or historical record. But even as we seek to understand the nature of the chronic trauma suffered by indigenous peoples, it must not be assumed that merely confronting the past will lead to a remedy or the restoration of socio-political and cultural heritage. There are no guarantees that any confrontation with the past will provide an immediate reconciliation, as the recent history of the TRC suggests. The confrontation is intergenerational, and research should pay attention to the manner and purpose of redress that extends beyond the state.

Restoring the heritage of indigenous peoples must not be confined to a confrontation that is state-centric. The warning bell is that states act in their own interests but the saving grace is that in democracies moral communities influence how interests are conceptualised and ordered. It is entirely plausible to expect that a great deal of research into confronting the chronic trauma experienced by indigenous communities will gather foci that exist outside the immediate control of the state. These include studying community initiatives aimed at art and language preservation, oral traditions, cultural practices and religious observations, among many other identity markers or signifiers. The point is that the state is a partner in enabling redress but that the processes of restoration necessarily extend beyond the purview of the government and its ruling elite to the agency of indigenous peoples themselves.

It is at this point where there is tremendous scope for developing the purpose of confronting the indigenous past. If the plight and conditions of indigenous peoples are to be effectively merged into the mainstream business of the post-colonial state, then there is a need for research aimed at entrenching indigenous rights into the socio-political fibre of the post-colonial state. At the same time, nonetheless, there is a need to recognise and understand that redress and even reconciliation are not the sole responsibility of the state. Outside of the corridors of state power the energies of indigenous peoples as found in subsequent generations will necessarily define the role and place of indigenous heritage, culture and language, among other identity markers. The state, of course, has a role to play in creating and sustaining the necessary liberties that allow indigenous peoples across generations to define and redefine their identities inside the post-colonial nation-state. Toward this reorientation, it is necessary to focus research on specific case studies to explain why addressing the collective chronic trauma suffered by indigenous peoples is ultimately a progressive politics steeped in a democratic vision of a re-imagined post-colonial nation-state.

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Conclusion

Ridwan Laher and Korir Sing'Oei

There is little doubt that the assertion of indigeneity and indigenous rights is contested political terrain. This is not a new revelation and hardly one that will be solved or resolved in the foreseeable future. It is also not a unique controversy but rather one that has taken on global dimensions wherever communities have self-defined as indigenous and decried their marginal positions in post-colonial nation-states in particular. What makes the case of indigenous peoples in Africa unique is the fact that the African Union (AU) has adopted a ground-breaking ruling that affirms the existence of indigenous peoples. The ruling emanated from the AU's African Commission on Human and Peoples' Rights (ACHPR) in 2010 as related to the Endorois decision and it adds the legal reality that indigenous peoples' rights cannot be erased by time or ignored by modern political conventions.

Key to this ruling is the communal sovereignty to self-define and to petition for redress where ancestral land has been lost or confiscated, either in the era of European colonialism or the subsequent one of national independence. The AU sanction requires member states to proactively prioritise the development of indigenous peoples. What this means is that African nation-states which are member states of the AU are found to be in contravention of their treaty obligations if they act to undermine the recognition and development of indigenous peoples under their jurisdiction.

This ruling has wide and important implications for the ongoing debate on the character and content of indigenous peoples. A foremost implication is that no member state of the AU can conspire to create a domestic legal regime that erases indigenous peoples and their rights to self-definition and inclusive development. A further implication of the AU sanction is that indigenous rights are a matter of continental oversight. In other words, African nation-states are expected to act as a continental community to ensure that indigenous peoples and their rights are a matter of transparent inclusion and accountable treatment across the continent.

The progressive and deliberate nature of the sanction to recognise indigenous peoples in effect significantly moves the development goalposts on the African continent. At the centre

of such recognition is enactment of land reform that demarcates indigenous land, and effects tenure security to communities. Land reform, or the lack thereof, is a long-term structural issue that presses on deeply into the era of post-colonial independence. It is a crucial issue because without land reform we cannot even begin to negotiate a wider consensus on the substance of indigenous rights. Without land reform there can be no conversation that leads to policies of sustainable and equitable development for indigenous peoples. Dare we even speak of creating a history-altering moment that moves toward indigenising development?

The depressing reality is that indigenous peoples find themselves vexed into hostile conflicts over land reform, as illustrated in the Endorois case. The outcome is traumatic alienation and unacceptable impoverishment due largely to displacement, marginalisation and periodic episodes of violent abuse by dominant ethnic groups often aligned with state prerogatives or interests. The AU's directive to its member states is to change these exacting conditions. This will be no easy task even where the necessary political will is present.

What is more evident when surveying the conditions of indigenous peoples is that they are among the most vulnerable and underdeveloped populations on the African continent. Though much must be made about the impact of the Endorois case, the truth is that national development policies among African states tend to entrench the marginal position of indigenous peoples. In these terms, it would not be unreasonable to view development policies, in fact even the neo-liberal development discourse that is fashionable now, as wholly at odds with indigenous rights. What is needed is more concerted effort through research and activism to make indigenous peoples more visible in the development agendas of African states. Moreover, there is a need to appreciate the variances between indigenous and neo-liberal or state-centred development.

The pressing question is how this will be made to happen, given that it is a complex and layered question that is not easily answered. At a formative level, any address will necessitate creating intricate networks of developmental association among researchers, activists and policymakers. Such collaboration would have to seek durable solutions to the pervasive developmental problems that dog indigenous peoples across intersectional divides. These divides pertain to developmental concerns that situate indigenous people as complex communities characterised by the intersections of age, gender, class, cultural and religious beliefs, and economic activity, among others.

Indispensable to gathering a more complete picture is the matter of affirming the voice and input of indigenous peoples. Research and policy development aimed at addressing the conditions of indigenous peoples cannot be conceived externally and applied to their circumstances in a prescriptive manner. This may seem like an elemental concern but ignoring its veracity will prove fatal. In fact, an admitted self-critique of this book is that it has not drawn a significant contribution from indigenous researchers and activists. This does not mean that the existing contributions should be viewed with scepticism, or worse, set aside. The point here is not to press an unsophisticated reverse-essentialist argument but rather to advocate the agency of seeking ways to include indigenous peoples in defining themselves and the issues that pertain to them. It is the all-important matter of agency that is being

privileged here with the well-intentioned hope that future discussions will endeavour to be more inclusive of indigenous scholarship.

Collaborative work, therefore, is an essential element of making indigenous rights more present in state policies. Indigenous communities and their representative organisations have already shown the way forward by teaming up with partners across the African continent and the wider global community to agitate for their interests and rights. This is a positive fact of globalisation, and the Endorois case is just one example of such continental and global collaboration, but even while we applaud the progressive outcomes at this moment, the worrying reality is that indigenous rights remain off the radar screen of national development. In fact, the worn scenario of viewing indigenous peoples as development hindrances and the consequent exclusion of their place in development planning is still mainstream practice.

When we as editors first sat down in Lamu town in late 2010 to discuss the focus of this book, these twin concerns were very present in our conversations. We talked broadly about the history of development practice from the colonial period through independence, and the consensus was that not much had changed in the treatment of indigenous peoples. Colonialism structured the negative place of indigenous peoples in artificially created nation-states, and independence confirmed that negativity and largely continues to do so through development policies of benign neglect. In too many cases, benign neglect has given way to aggressive development designs that pay no mind to the place of indigenous peoples and their overall way of life.

The discussion in Lamu was particularly spirited since we were there to attend community forums called to bring attention to Kenya's decision to develop Lamu District and the surrounding areas through collaboration with Chinese expertise and capital. Residents in Lamu District were distraught with worry that their way of life would be eroded and that hundreds of years of heritage would be lost. Their worry was compounded by the fact that the government in Nairobi had not worked to include these communities – many of them indigenous ones still struggling to regain land lost to colonialism. Few of the residents were even aware of the contents of the Endorois decision or the decision by the AU to call on African governments to be pro-indigenous in their development plans.

As of this writing, the situation remains unresolved and the worry may have eased somewhat, but it is hardly absent, and herein lies the rub of the problem. Indigenous peoples are too often made to exist outside the halls of authority. Their expectations exist in a vacuum that can be impacted upon when governments draw lines of intersecting interests, which all too often are inherently conflictual. In the Kenyan case, this conflict is prescriptive in the sense that it is derived from a long history of conflict on the bodies of indigenous peoples, so to speak. That conflict has created a discriminatory hierarchy that places indigenous peoples and their lifestyles at odds with conceptualisations of what is modern and consequentially desirable for nation building.

Kenya is, of course, not alone in this conflictual dilemma, but as of this writing, and given the context of the Endorois decision for development planning in Kenya, the international spotlight is very much on Nairobi and its attitude to indigenous rights. For researchers and

other observers seeking a test case, so to speak, two important questions come to the fore. The first is whether the Endorois decision will cause sufficient concern for the Kenyan government to reorient its development agenda and policies as they relate to indigenous rights concerns. For the communities in Lamu District this question is particularly a matter of life and death, so to speak. The second question has further implications and it relates to the wider arena on the African continent, and perhaps even beyond. Will the AU's sanction of the decision in the Endorois case give sufficient reason to entrench a democratising approach to the place and role of indigenous peoples in African state politics?

If an answer to these broad questions is forthcoming from a reading of the chapter contributions here, then it must be that state politics and interests reign supreme. Poignantly, the axiom taught to undergraduate political science students that the state acts in furtherance of its own interests all the time is yet again evident. Add to that the problem of enforcing international law, and the reality is that the Kenyan government is found to be wavering on its obligations. Sadly, the ACHPR ruling in the Endorois case has not realised a seamless implementation of the ruling by the Kenyan government. Instead, it would not be unfair to say that Kenya has dragged its feet in complying with the ruling, and all indications, as of this writing, are that this situation is unlikely to change or to influence the manner in which the government prioritises national development policies. In a continental context, the AU sanction has also hardly marked a greater awareness of the place of indigenous peoples and their rights.

New research must account for this lack of political will or inertia. We cannot ignore the institutional weakness of the AU and its ability to enforce compliance of the Endorois decision or even its lack of capacity to oversee the development of more progressive attitudes toward indigenous peoples across the continent. That aside, the problem of indigenous development is unescapably a matter of democratisation. In other words, the larger problem is to locate indigenous peoples in the struggle toward democratic nation building. New research must pay attention to the overall relationship between processes of democratisation and indigenous rights. Such attention would pay mind to the operational continuum inside the nation-state and outside where indigenous rights are afforded legal and political sanction.

The importance of this developmental arena was illustrated in Kimberley, South Africa, in mid-April 2013, when the Department of Rural Development and Land Reform sponsored a Khoi-San dialogue. The express intent of the dialogue was to gather peoples who self-define as indigenous in a discussion of identity, citizenship and land reform. The latter aspect was highlighted because of the centennial commemoration of the 1913 Natives Land Act that dispossessed Africans of land rights. What emerged was an often acrimonious interaction among delegates bemoaning the perceived lack of progress in addressing indigenous concerns of the Khoi and San communities. Representatives of both communities berated representatives of the government for creating what one San delegate referred to as a 'second colonisation'.

Throughout the two-day conference, the concerns of who was indigenous and what indigenous rights mean in a post-apartheid democracy were never far away from extended exchanges. Some outside observers may have been surprised by the tension that abounded,

but for those who were more familiar with the debates around indigeneity in post-apartheid South Africa, the acrimony could hardly have come as a surprise. A key concern that was expressed was the alleged greying of what it means to be indigenous. As it stands now there is no legal definition or terms that give Khoi and San communities the sole or exclusive right to self-define as indigenous peoples. In effect, South Africa collapses all peoples of African descent into the broad category of 'indigenous'. Several of the speakers from the Khoi and San communities decried this practice, saying that it did not honour the original inhabitants and owners of the land before Bantu tribes migrated from the central African region into southern Africa.

It is unlikely that the South African government will enact legislation that gives the Khoi and San communities the sole right to being indigenous peoples. This, however, does not mean that their claim to original land ownership is without recognition in cases where it can be proven. In fact, the purpose of the dialogue was to prepare the two communities for a possible reopening of land claims that preceded the 1913 Natives Land Act. This means that the government will reverse its previous position that only allowed claims emanating from the era after the 1913 Natives Land Act. It is a significant concession that has wide implications for land reform and the plight of indigenous Khoi and San.

What will continue to stand even if large swathes of land are returned to Khoi and San communities is the inclusive definition of who is and who is not indigenous in South Africa. It is conceivable that some aggrieved communities who resonate with the comment of a 'second colonisation' may seek to apply the terms of the Endorois decision, especially where competing claims among indigenous peoples are being contested inside the legal and political arenas in South Africa. And so even though the post-apartheid state can be viewed as among the most progressive with regard to indigenous peoples and their rights, the all-pervasive issue of political contentiousness is not too far from the surface. This is not to say that the tensions are so volatile that it tears at the fabric of what it means to be a South African in the post-apartheid era, but it does complicate what it means to be indigenous and the rights afforded or recognised by that status.

New research will have to take recognition of these strains, which are not unique to South Africa or its neighbours, Namibia and Botswana. In fact these strains are commonplace wherever indigenous peoples are to be found – in Africa and beyond. Consequently, there are pressing questions that call for a deeper understanding of universal democratic rights of citizenship and its relationship to indigenous rights. For some the acrimony coming from outside of indigenous communities is related to the concerns of fairness, equality and the processes democratic justice. It is perhaps here where the resistance, or at least inertia, can be attributed. That is to say it may be that communities who are not indigenous are resistant, even disdainful, of any movement to apportion unique or speciality rights to communities that self-define as indigenous.

We should expect that the questions of identity and the claim of indigenous rights will be present, not only in matters of development but also in the manner in which indigenous identity is described or characterised in the post-colonial nation-state. The nation, in

particular, is not a static concept and the tensions described above will continue to have an impact on its character. Indigenous identity is a formative part of the discussion of the content of a nation. It is a complicated discussion because indigenous identity cannot easily be contained by geographic or sovereign nation boundaries, but complexity gives cause for introspection and problem solving, and that is the main concern in bringing these chapters together: we wanted to spur on a conversation in the aftermath of the AU's sanction of the Endorois decision.

For policymakers, the terrain of indigenous rights can seem like an operative minefield that is best avoided, but this is not a reasonable or progressive option. Outside of the contentiousness of who is and who is not indigenous, what we do know, as noted above, is that these communities are among the most impoverished and consequently oppressed on the continent. Furthermore, it does not take too much analysis to recognise that this widespread impoverishment is derived from structural conditions set in place by the carving up of the continent into nation-states. In this context, the problem of indigenous underdevelopment and marginality is layered across factors that draw on historical, economic and political conditions. As a result, policymakers will have to find ways to address the interrelated concerns of food security, healthcare, education, gender equity and employment, among other pressing socio-economic concerns.

It is perhaps insightful to take the example of South Africa's decision to characterise itself as a developmental state when considering the enormous national task of equitable and sustainable development. There is a need to extend the conceptual notion of the African developmental state to include indigenous peoples. New research could, for example, link indigenous rights to an expanded definition of the workings of a developmental state. This could include finding ways to draw marginalised indigenous peoples into national developmental planning with an eye on mainstreaming their socio-economic needs and desires. Such developmental planning could harness indigenous expertise and combine it with the resources of the state, thereby affirming the democratic ideal of inclusive citizenship.

Whatever the direction of development planning, the future of indigenous rights research is perhaps unavoidably tied into the activist-academic framework that is concerned with redress and overall well-being. We are, however, nowhere near to realising the ideal of equal citizenship in the post-colonial African nation-state. In fact, as noted above, the very notion of what makes up the nation is far from settled common sense. There is also the problem of gender equity as it pertains to women inside indigenous communities that cannot be ignored. What this all means is that the terrain of indigenous rights will remain vexed by the larger battle and processes to balance the politics of the post-colonial nation-state. Such a balance is determinedly a matter of democratisation and the related cause of creating durable institutions that safeguard and promote the overall well-being of all citizens, including indigenous peoples.

Of course democratisation does not only mean regular elections or the maintenance of the rule of law. A more nuanced appreciation of democratisation must necessarily reflect the ideal of unfettered inclusion and special recognition of circumstances that have precluded

indigenous peoples from being participative citizens in the post-colonial state. In so doing, it is a matter of democratisation to extend corrective measures that would render programmes of upliftment and rehabilitation a necessary policy mandate if indigenous peoples are to be formally recognised and drawn away from the oppressive margins of the nation-state. To get to this point there will have to be a considered and deliberate application of political will, which will have to be the kind that affects the very definition of what the post-colonial nation state looks like in content and character.

The chapters in this book have attempted to start a conversation that is continentally diverse yet united around the thematic concerns of indigenous identity and indigenous rights. As indicated in the introduction, there is no general agreement among the contributors that can be deemed prescriptive. That said, the editors generally share the view that indigenous peoples exist and that the field of indigenous rights, though contested, is a burgeoning reality. We hope that readers from across the disciplines and outside of the research and academic communities – particularly policymakers – will engage with the discussions presented here. Such an engagement is necessary to advance the thinking on indigenous peoples and indigenous rights.

In closing, we invite readers to interact with the authors, and for this reason we provide their contact details. The thinking behind such interaction is aimed at creating a larger conversation, and thereby advancing the subject matter and issues covered. We are sure that this volume is a timely insertion into the debate around indigenous rights in Africa, but we hardly expect it will be long before more discussions are added. If this is the case then we have at the very least achieved our aim of provoking a spirited and much-needed conversation.

Indigenous People in Africa

Contestations, Empowerment and Group Rights

This volume is an attempt to provide this intersectional and reflexive space. The thinking behind the book began in Lamu in mid-2010. It was a time when growing community resistance emerged towards the Kenyan government's plan to build a second seaport under a trans-frontier infrastructural project known as the Lamu Port- South Sudan-Ethiopia Transport Corridor (LAPSSET). The editors agreed that a book that draws community activists, academics, researchers and policy makers into a discussion of the predicament of indigenous rights and development against the backdrop of the Endorois case was timely and needed.

Assembled here are the original contributions of some of the leading contemporary thinkers in the area of indigenous and human rights in Africa. The book is an interdisciplinary effort with the single purpose of thinking through indigenous rights after the Endorois case but it is not a singular laudatory remark on indigenous life in Africa. The discussion begins by framing indigenous rights and claims to indigeneity as found in the Endorois decision and its related socio-political history. Subsequent chapters provide deeper contextual analysis by evaluating the tense relationship between indigenous peoples and the post-colonial nation-state. Overall, the book makes a peering and provocative contribution to the relational interests between state policies and the developmental intersections of indigeneity, indigenous rights, gender advocacy, environmental conservation, chronic trauma and transitional justice.

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